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Sept. 20

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NEW YORK WEEKLY DIGEST

OF CASES DECIDED

IN THE

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		Vol. 21, pp. 185, 186, erase case of Hubbell v. The City of Yonkers. It is the dissenting opinion. Vol. 21, p. 493, 2d col., line 32, for Jere. Weinberg, read Jere. Wernberg. P. 499, line 80, for E. H. Berm, read E. H. Benn.	

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VOLUME XXI.

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WILLS. UNDUE INFLUENCE.

N. Y. COURT OF APPEALS.

*In re* probate will of Martin, deceased.

Decided Feb. 10, 1885.

Where the testatrix had testamentary capacity, a present knowledge of the contents of the will, and was surrounded by all the safeguards provided by the statute, the will can be avoided only by influence amounting to force or coercion and proof that it was obtained by this coercion.

To establish fraud or undue influence in the execution of a will something more must be shown than the relation of parent and child and an opportunity for unfair dealing. There must be evidence that the parent was imposed upon or overcome by the practices of the child to the benefit of the latter.

M. died Sept. 10, 1880, leaving three sons and four grand-children, children of a deceased daughter. On June 21, 1881, W. C. M., one of the sons, as executor, offered for probate as the will of M. an instrument dated August 9, 1879.

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One of the grand-children appeared as a contestant, and alleged in her answer that the paper was not the last will and testament of M., and that its execution was not her free and voluntary act; that she was not at the time of its execution of sound mind, memory and understanding; that it was not subscribed, published and attested in conformity with the statute; that the attesting witnesses did not sign their names at her request; that the instrument so offered for probate was obtained and its execution procured by the fraud, circumvention and undue influence of the three sons of M. or one of them. The property of the decedent consisted of real estate, which she distributed among her three sons subject to the payment by them to each of the grand-children of fifty dollars. There was no proof of influence exerted or existing. Upon the trial of the issues

the Surrogate found that the testatrix subscribed the will described in the petition at the end thereof, in the presence of two attesting witnesses, who signed their names thereto at the request of the testatrix, in her presence and in the presence of each other; that at the time of subscribing it the testatrix declared to both of the witnesses that the instrument so subscribed by her was her last will and testament; that at that time she possessed testamentary capacity, but that said will was obtained from her through the undue influence of her son W. M. A decree was made denying probate to the will. On an appeal by the executors to the General Term, on a case containing the evidence, the decree of the Surrogate was reversed and the proceeding remitted to him with directions to admit the will to probate. The contestant appeals from that decision. The appellant's counsel conceded that before the testatrix signed the will "it was either read to or its contents explained" to her.

*C. Morschauser*, for applt.

*William J. Sayres*, for respts.

*Held*, That this being a case where the testatrix had testamentary capacity, a present knowledge of the contents of the will, and where at its execution she was surrounded by all the guards which the statute has prescribed to prevent fraud and imposition, the will can be avoided only by influence amounting to force or coercion, and proof that it was obtained by this coercion. The burden of proving this is on the party who

makes the allegation. 35 N. Y. 559; 68 id. 148.

It was claimed that because the proponent of the will was the son of the testatrix and communicated to the scrivener the provisions to be inserted in the will, and became himself a beneficiary, fraud and undue influence was shown.

*Held*, Untenable. To establish fraud or undue influence in the execution of a will something more must be shown than the relation of parent and child and an opportunity for unfair dealing. There must be evidence that the parent was imposed upon or overcome by the practices of the child to the benefit of the latter before the burden of proof can be shifted. 35 N. Y. 559; 68 id. 148.

*Also held*, That it was not improper for the Supreme Court to direct judgment.

*Sutton v. Ray*, 72 N. Y., 482, distinguished.

*Also held*, that under the circumstances costs should be imposed on the contestant.

Order of General Term, reversing decree of Surrogate and directing the Surrogate to admit the will to probate, affirmed.

Opinion by *Danforth, J.* All concur.

## MANDAMUS. BROOKLYN BRIDGE.

N. Y. COURT OF APPEALS.

The People ex rel. Stranahan, *respt.*, v. Thompson, *applt.*

Decided Jan. 20, 1885.

A mandamus cannot be granted to compel the issuing of a permit to the trustees of the Brooklyn Bridge to enter upon certain

streets to lay foundations for the approaches to the bridge where the effect thereof will be to allow the trustees to place pillars or columns in such streets.

Chap. 399, Laws of 1867, prohibits the interposition of any obstacle to the free and uninterrupted use of the streets, and confers no authority which authorizes the exercise of any discretion in determining the character of the obstruction.

The relator applied for a mandamus to compel the Commissioners of Public Works and the Department of Parks to grant a permit to the Board of Trustees of the Brooklyn Bridge to enter upon Chatham and Centre Streets in the City of New York, for the purpose of laying the foundation to complete said bridge in accordance with a map filed in the register's office. The effect of the permit asked for would be to allow the relator to construct a platform over said streets supported by pillars or columns resting in one or both of said streets. Section 10, of chapter 399 of the Laws of 1867, the Act incorporating the Bridge Co., declares that said bridge "shall not obstruct any street which it shall cross, but that such street shall be spanned by a suitable arch or suspended platform as shall give suitable height for the passage under the same for all purposes of public travel and transportation." The motion for a mandamus was granted.

*James C. Carter*, for applt.

*Aaron J. Vanderpoel* and *Wm. N. Dykman*, for respts.

*Held*, Error; that the statute prohibits the interposition of any obstacle to the free and unobstructed use of the streets. The

provision that the streets shall be spanned by a suitable arch or suspended platform means that the pillars or columns shall be erected outside of and beyond the streets. The statute confers no authority which authorizes the exercise of any discretion in determining the character of the obstruction. The Board of Trustees have no right, in the exercise of their powers under said section (§10), to say that any erection in the streets made by them can occasion only a trifling obstruction and is therefore not violative of the statute, nor have the courts power to review their action and decide, under the statute, how far and to what extent pillars or columns may be erected which will occasion any obstruction.

The legislature intended to confer absolute authority for the building of the bridge through such streets as might be required upon payment of compensation to abutting owners, and to protect the public streets and the crossings of the same by positive and clear restrictions, which are equally applicable to all streets necessarily to be crossed by the bridge, and no distinction can be made in favor of any portion of the bridge or its approaches which authorizes a disregard of the statute.

While property devoted to one public use may be applied to another, this can only be done when express authority is given for that purpose by the clearest provisions of law.

Order of General Term, affirming order granting motion for

mandamus, reversed, and motion for mandamus denied.

Opinion by *Miller, J.* All concur, except *Earl and Finch, JJ.*, dissenting.

### JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William H. Robinson, *applt.*, v. Nathaniel Hall, *impld.*, *respt.*

Decided Jan., 1885.

No final judgment can be entered upon a decision of the Special Term sustaining a demurrer to one of the causes of action set forth in the complaint, and dismissing the complaint as to that cause of action with costs to the defendant, and directing judgment to be entered accordingly, while the issues of law raised by the other grounds of demurrer remain undetermined. The entry of a judgment for costs by defendant is, in such case, irregular; but the remedy of plaintiff is by application to the Special Term, and not by appeal.

Appeal from judgment entered upon decision at Special Term, sustaining a demurrer by defendants.

Defendant demurred to the complaint upon the grounds, first, that the causes of action have been improperly united; second, that the complaint in the second and third causes of action therein set forth does not state facts sufficient to constitute a cause of action. The complaint contained five separate causes of action. The issues of law raised by the demurrer were argued at Special Term, and the justice presiding held and decided "that said second cause of action contained in the complaint herein does not state facts sufficient to constitute a cause of action. The

demurrer is sustained, and the complaint must be dismissed as to said second cause of action, with costs to the defendant," and directed judgment to be entered accordingly. Upon this order defendants entered judgment dismissing the complaint as to said second cause of action, and for \$46 costs to the defendants, from which plaintiff appealed.

*J. M. Dunning*, for *applt.*

*A. H. Harris*, for *respt.*

*Held*, That no final judgment could be entered while the issues of law raised by the other grounds of demurrer remained undetermined, Code, § 1021; 6 How. 113; 8 Abb., 366; 9 Hun, 633; 8 J. & S., 211, and the entry of judgment for costs by defendant was irregular; but that the remedy of plaintiff was by application to the Court at Special Term, and not by appeal to this court. 10 N. Y., 570; 22 N. Y., 425.

On such an application the Court could set aside the judgment irregularly entered, and make such order as would properly dispose of the remaining issues raised by the demurrer, and in case the demurrer should be overruled as to such issues secure to the defendant the right to answer upon such terms as should be imposed.

We are aware that the General Term has entertained an appeal and reversed in similar cases, but it does not appear that the attention of the Court in those cases was called to the question here discussed. We are of the opinion that correct practice requires us to re-



fuse to entertain this appeal, and to remit the parties to the Special Term, where their rights can all be settled.

This appeal should therefore be dismissed, but as both parties are in fault in their practice without costs and without prejudice to the right of the plaintiff to apply to Court at Special Term for such relief as he should be advised.

Opinion by *Childs, J.*; *Bradley* and *Haight, JJ.*, concur.

INSURANCE. ACCOUNTING.  
N. Y. COMMON PLEAS. GENERAL  
TERM.

Frederick Uhlman v. The New  
York Life Ins. Co.

Decided Jan. 16, 1885.

Where a life insurance policy provides for an accumulation and preservation of dividends which it had earned at the expiration of ten years from surplus profits derived from lapsed policies, which dividends were to be apportioned equitably and applied to an annuity bond, or paid in value to the assured in cash, *Held*, That the relation created between the company and the insured is not fiduciary, but rests in contract, and that the insured is not entitled to an accounting; the determination of the amount of dividend being confined to the company, and only to be questioned in an action alleging non-performance of contract obligation.

Motion by defendant for a new trial at General Term under § 1001, Code Civ. Proc.

Plaintiff was the holder of a life insurance policy, dated December 29, 1871, issued by the defendant, containing this clause :

"All surplus or profits derived from such policies on the ten-year

dividend system as shall cease to be in force before the completion of their respective ten-year dividend periods shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period. The ten-year dividend when made shall be applied to the purchase of an annuity on and to continue during the life of the party insured under this policy, and for which the company will issue an annuity bond, and the first payment of such annuity shall be due one year after the termination of the ten-year dividend period, provided that, should the party assured under this policy request it in writing within thirty days from the termination of such ten-year dividend period, the company will pay the value of the bond in cash to Frederick Uhlman or assigns at the date the first payment under such annuity bond shall be due." Upon the expiration of ten years from date of policy the defendant notified plaintiff that he was entitled to an annuity bond or its value in cash, \$790.77. Plaintiff therefore demanded an accounting, which was refused, and he then filed this bill praying a decree for an accounting and the issuing to him of annuity bond for the sum he might appear entitled to or payment of its value in cash. The Court below (*Van Hossen, J.*), by interlocutory decree, directed an accounting before a referee.

*William Hornblower*, for the motion.

*Blumenstiel & Hirsch*, opposed.

*Held*, That the relation created between the parties to this action by the insurance policy is not fiduciary, but rests in contract.

Plaintiff's rights thereunder are :

First, An equitable apportionment of the surplus or profits derived by the company from such policies, in plaintiff's class, as shall have lapsed during the ten-year period. Second, That the ten-year dividend may be applied by plaintiff to the purchase of an annuity, for which defendant will issue a bond, or, in certain event, pay its value in cash. The contract obligation of defendant is to equitably apportion the surplus or profits so derived, give the bond or pay the cash.

The amount which became due to plaintiff is a dividend, and neither more nor less. Neither by analogy to other corporations declaring dividends, nor under any provision in the contract, is plaintiff to have aught to do with determining the gross surplus or its apportionment. The defendant's obligation under the contract respecting the declaration of a dividend at the appointed time makes the case dissimilar to those adjudications where corporations were parties not bound by like contract. But the principle applies to the amount of the dividend. Determination of amount is a duty confided to the company, and can only be questioned by plaintiff in an action alleging non-performance of contract—obligation. There are no such allegations in this bill.

The defendant owes no debt to

the plaintiff until after the dividend has been declared. The plaintiff, therefore, can have no right as creditor to an account, because the settling of the account and the declaration of a dividend must precede and constitute him a creditor. The position is not tenable that because a complicated account is necessary to ascertain and apportion the surplus the plaintiff is entitled to invoke the exercise of equitable jurisdiction. This could only be so if plaintiff had any right to interfere in the account. The contract gives him none by its terms or intendment, and there are neither mutual accounts, complicated dealings, nor fiduciary relationship.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Beach, J.*; *Daly, Ch. J.*, concurs.

*Larremore, J.*, dissenting, wrote:

\*\*\* "These dividends, I think, constituted a trust fund in the hands of the company for the benefit of its policy-holders, who have a right to know the facts and figures upon which such dividends were allowed. The defendant, by its answer, has raised the issue of an accounting, and so complicated in its nature that its consideration by a jury is evidently impracticable. This case is distinguishable from 'Taylor v. Charter Oak Life Insurance Co., 9 Daly, 489, and like cases, in which the policies had not matured, and in which the rights of the assured were contingent.'"

## NEW TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Fisher, *respt.*, v. Stephen M. Corwin, *applt.*

Decided Jan., 1885.

A new trial, on the ground of newly discovered evidence, must be denied after the judgment has been affirmed on appeal.

Appeal from Special Term order, denying defendant's application for new trial on the ground of newly-discovered evidence.

The issues were tried by a referee who reported in plaintiff's favor, and judgment was entered Dec. 8, 1877. Defendant appealed to General Term, which Court in October, 1881, ordered a new trial unless plaintiff stipulated to reduce the damages. Plaintiff made the required stipulation, and the judgment was accordingly affirmed. Thereupon, without delay, this motion was made at Special Term.

John W. Beckley, for *applt.*

George Ripsom, for *respt.*

*Held*, That the motion comes too late. It is not the practice to grant new trials on the ground of newly-discovered evidence after judgment has been affirmed on appeal. Before and since the first code the practice has been not to entertain motions of this character after appeal from final judgment. The current of decisions is not to entertain the motion after entry of judgment. 15 Johns., 354; 4 Hill, 125; 27 How., 358; 30 Barb., 656; 33 Id., 155; 38 N. Y., 42.

This motion is of the same class as those enumerated in § 724 of the

Code, and more than four years elapsed from entry of judgment to making this motion. The judgment must not be disturbed on the grounds stated.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Barker, J.*; *Haight, Bradley and Lewis, JJ.*, concur.

## LEASE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John P. Vidvard, *applt.*, v. Daniel J. Cushman, *respt.*

Daniel J. Cushman, *respt.*, v. John P. Vidvard, *applt.*

Decided Jan., 1885.

A new stipulation may, by consent of the parties, be added to a contract after its execution, if such stipulation is evidenced and executed in the mode that the original contract is required to be evidenced and executed.

Where the added stipulation is written in the lease by the lessor in the presence and with the assent of the lessee, it is unnecessary to re-sign the lease.

Appeals from judgments, entered upon decision at Special Term, adjudging that the parties have the right to use a stairway in common.

Oct. 25, 1879, V. leased of R. Bros. the premises No. 27 John St., Utica, for five years, from May 1, 1879, by a lease not under seal.

Dec. 1, 1878, C. leased of R. Bros. the adjoining premises No. 29 John St., until Jan., 1881, by lease under seal. Both leases were executed in duplicate, each party retaining one.

In No. 27 is the stairway in dispute, by which the upper floors in

both buildings are reached, a doorway opening from the hallway on the second floor into No. 29. A controversy arose between V. and C. as to the right of the latter to use the stairway as a means of entrance to the upper floors of No. 29.

The trial court found that after the execution of the leases it was agreed between V. and his lessors, in consideration of \$35 paid by the lessors to him, that the tenants of Nos. 27 and 29 should use the stairway in No. 27 in common, and that a clause expressing the agreement was then written in the duplicate lease held by the lessors in the presence and with the assent of V.

The evidence on this question was conflicting. R. and V. squarely contradicted each other. R. testified that after the alteration had been made, and before the suits were begun, V. exhibited his duplicate lease, and that the new provision was written therein in the handwriting of Judge Cox. V.'s duplicate was produced on the trial and showed that some provision had been interlined and erased, occupying the same position as the added clause in the lessors' duplicate, but its terms do not appear except as stated in appellant's brief. It there appears as follows: "The parties now occupying No. 29 John St. shall have the right to use the stairway in No. 27 for the period of one month." V. testified that when the \$35 was paid, "Nothing was said about the stairway at all, sir." It does not appear that V. attempted to explain why the clause was written in the lease or why it was erased.

*P. C. J. De Angelis*, for applt.

*D. C. Stoddard*, for respt.

*Held*, That in the face of this evidence and of V.'s failure to explain this Court would not be justified in reversing the finding of fact. It cannot be said that the weight of evidence is greatly in favor of V. It is difficult to see how Judge Cox, who must have written from the dictation or upon information received from V., came to write the provisions referred to if there had been no talk in respect to the stairway. Assuming that the added provision is correctly stated in appellant's brief, it certainly does not tend to corroborate or strengthen the evidence of V.

By the consent of the parties a new stipulation may be added to a contract subsequent to its execution, if the new stipulation is evidenced and executed in the mode that the original contract is required to be evidenced and executed. 9 East, 350; Whart. Ev., § 624; 1 Chit. Cont. (11 Am. Ed.) 155; Reed on Stat. of Frauds, § 454; Leake's Cont., 795. The original lease, and the lease as modified, being for terms longer than a year, were required by the Statute of Frauds to be in writing and signed by the lessors. The original lease was in writing, as was the modified lease.

It is claimed that the new lease is not binding, because it was not re-signed by the lessors and re-delivered.

*Held*, Untenable. The added stipulation was written in the lease by one of the lessors in the presence and with the assent of the lessee.

The signatures of the contracting parties were then upon the lease. This was a good execution of the new or modified lease. 7 Exch., 862 ; 4 Johns., 54 ; 13 Wend., 587 ; 9 East, 350 ; Leake's Cont., 814, 815. The transaction between the parties, as found by the Court, amounts to a re-execution and re-delivery of the lease in its modified form, and it became as binding in that form as though it had been re-drafted and re-signed. Re-writing or re-signing, or both, would have added nothing to its validity. In all such cases the modification should be clearly established ; but when so established it becomes binding as a new contract.

Judgment affirmed with costs.

Opinion by *Follett, J. ; Hardin, P. J., and Boardman, J., concur.*

### EVIDENCE.

#### N. Y. COURT OF APPEALS.

*Lewis, exr., respt., v. Merritt, applt.*

Decided Feb. 10, 1885.

When a party gives material evidence as to extraneous facts which may or may not involve the negation or affirmation of the existence of a personal transaction with a deceased person, the adverse party may give evidence of extraneous facts tending to controvert such proof, although these facts may also incidentally involve the negation or affirmation of personal communications or transactions.

This was an action upon three promissory notes, brought by plaintiff as executor of the will of his mother. Plaintiff was called as a witness and testified that the notes in suit were for some time previous

to his mother's death kept in a tin trunk under her bed ; that he saw them there the morning before she died, and on examining the trunk the following morning he found that the notes had been abstracted. They were afterwards found in defendant's possession, who, when they were demanded of him, refused to surrender them. Plaintiff also testified to facts showing defendant's presence in his mother's room during the last hours of her illness and the opportunity thereby afforded him to obtain unauthorized possession of the notes. The defence sought to be established was an alleged gift of the notes by the testatrix to defendant several days before her death, and some evidence was given in its support. Defendant was then called as a witness in his own behalf, and was asked whether he took the notes from any trunk or any person. This question was objected to and excluded and an exception taken. Defendant also testified to a conversation between the testatrix and one M. occurring in his presence some two days before the death of the testatrix. He then offered to show by his own evidence that at the time of this conversation he had possession of the notes. This was objected to by the plaintiff, and excluded, and an exception taken.

*Daniel Morris*, for applt.

*M. A. Leary*, for respt.

*Held*, Error ; that the evidence excluded was competent. It was justified by the affirmative evidence given by plaintiff reflecting upon the same transaction and

communications. It was also competent for defendant to give evidence of any extraneous facts and circumstances which tended to show the falsity of the evidence given by plaintiff, although such facts also incidentally tended to establish the inference that a personal transaction or communication between the witness and the testatrix had taken place.

When a party gives material evidence as to extraneous facts which may or may not involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of personal communications or transactions. 88 N. Y., 447; 85 id. 639.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Ruger Ch. J.* All concur, *Earl J.* on first ground, *Danforth J.*, absent.

#### PLEADING. FALSE IMPRISONMENT. MALICIOUS PROSECUTION.

N. Y. COURT OF APPEALS.

Marks, *applt.*, v. Townsend et al, *respts.*

Decided Jan. 20, 1885.

Actions for false imprisonment and for malicious prosecution, being for personal injuries, may be contained in the same complaint.

An order of arrest granted upon affidavit stating facts sufficient to give the judge jurisdiction will protect against an action for false imprisonment the judge who granted it and the party who procured it and instigated its service, although such order be afterward set aside on proof of extraneous facts. Even malicious motives and the absence of probable cause do not give a party arrested a cause of action for false imprisonment.

In the action for malicious prosecution the burden of showing want of probable cause is upon the plaintiff.

When final judgment is entered in favor of a party on trial, the prosecution is so far terminated that he may sue for malicious prosecution.

The complaint in this action alleged two causes of action—one for malicious prosecution and one for false imprisonment.

*A. Blumenstiel*, for *applt.*

*J. Langdon Ward*, for *respts.*

*Held*, That as both causes of action were for personal injuries they could be contained in the same complaint. Code, § 484; 30 Barb., 300; 10 Hun, 580; 85 N. Y., 383, 389; 53 id., 14; 93 id., 515.

No objection was taken to the joinder in the answer or by demurrer.

*Held*, That it was waived. Code, § 499.

It appeared that defendants procured an order of arrest against plaintiff under chapter 300 of Laws of 1831, known as the Stillwell Act, prior to its repeal by Chapter 245 Laws of 1880. The facts stated in the affidavit upon which the warrant was issued were sufficient

to give the judge who issued it jurisdiction. The fact that plaintiff had been before arrested in an action against him by defendants upon an order of arrest issued in the action for the same cause and upon substantially the same grounds being subsequently brought to his attention, he set it aside.

*Held*, That the warrant was not void or irregular; that when the fact of the former arrest was brought to the judge's attention it furnished him a ground for the dismissal of the warrant in the exercise of further judicial action. A warrant granted under such circumstances protects against an action for false imprisonment the judge who granted it and the party who procured it and instigated its service. 14 C. B., N. S., 596; 11 Mass., 500; 3 Caines, 268; 5 Wend., 240; 11 id., 31; 5 Hill, 242; 19 Barb., 283; 3 Lans., 53; 7 id., 131; 52 N. Y., 409; 71 id., 106; 85 id., 383; 87 id., 56.

If a warrant of attachment or an order of arrest is issued in an action upon facts giving the judge jurisdiction, and the defendant appears, and by showing new facts or denying those alleged against him procures the attachment or order to be set aside, the process is not void or voidable, or irregular, but simply erroneous, and protects the judge and the party who procured it against an action of trespass or false imprisonment. Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggra-

vate his damage, but have nothing to do with the cause of action.

*Also held*, That an action for malicious prosecution could not be maintained.

In an action for malicious prosecution the burden of showing want of probable cause is upon the plaintiff.

The defendants appealed from the order discharging the plaintiff to the General Term, where it was affirmed, they then appealed to this court. While that appeal was pending this action was commenced. The appeal was afterwards dismissed on the ground that this court did not have jurisdiction to hear it. It was claimed that the prosecution was not terminated so as to warrant an action for malicious prosecution.

*Held*, Untenable. When a party has a final judgment in his favor upon a trial, the prosecution is so far terminated that he may sue for malicious prosecution. If an appeal be taken from the judgment, that may furnish a reason for staying the trial of the action for malicious prosecution until the decision of the appeal.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Earl, J.* All concur.

#### EASEMENT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Luella S. Root, *respt.*, v. Harriet E. Wadhams, *applt.*

Decided Jan., 1885.

Where a grantor conveys a lot upon which, at the time of the conveyance, water flows from a spring upon another lot then owned and retained by the grantor, the grantee takes as an appurtenant the right to have the water flow as it did at the time of the conveyance to him; and, as against the grantor, the rule is not changed because a piece of land intervenes between the land conveyed and the land retained, through which intervening land the right to take the water is, by parol license, liable to be revoked by the owner.

Appeal from a judgment of Special Term, enjoining defendant from disconnecting or removing a certain pipe from a certain spring on defendant's land, which pipe is used to carry the water from the said spring across the land of an intervening owner to plaintiff's land. In 1865 one Bradbury was the owner of the lots now owned by the parties to this action. Between those two lots was a third lot owned by Beebe. Prior to 1865 Beebe, with the verbal consent of Bradbury, then owner of the spring lot, had laid a pipe and taken water from a spring on the lot now owned by defendant to his (Beebe's) lot and house, and has since taken water through such pipe from the spring until the supply was stopped by defendant in May, 1883. Prior also to 1865 one Merchant, then the owner of plaintiff's lot, and Bradbury's grantor of the same, with the verbal consent of Beebe and Bradbury, continued the pipe from the Beebe lot to the lot now owned by plaintiff, and from that time until May, 1883. Water was carried from said spring across the Beebe lot and to the lot owned by plaintiff through said pipe until

May, 1883. The pipe from the spring to the Beebe lot belonged to the owner of that lot, and the pipe from the Beebe lot to plaintiff's lot belonged to Bradbury when he sold plaintiff's lot to R. in 1870. R. conveyed to plaintiff in Feb., 1883. Bradbury continued to own the spring lot until his death, and it was sold to defendant by his executors in Feb., 1882. In May, 1883, defendant disconnected the pipes and stopped the flow of water through the same to plaintiff's premises.

*Albert F. Gladding*, for respt.

*George W. Ray*, for applt.

*Held*, That the judgment is correct. Had the two lots adjoined each other plaintiff would have acquired, under her deed, the right to the use of the water from the spring, as is claimed. The rule is not changed because a piece of land intervenes between the land conveyed and the land retained, through which intervening land the right to take the water is, by parol license, liable to be revoked by the owner. Bradbury owned both the servient and the dominant estate. As against himself he had the right absolute to use the water on plaintiff's lot as it was used when he sold it to R., who knew all the facts. He also had the right under the owner of the Beebe lot to use the pipe and carry the water through that lot so long as its owner did not object thereto or revoke his license. When he conveyed the right to the use of the water of the spring as then used passed as an appurtenant. Bradbury could not be heard



to object or permitted to obstruct such use, nor could he or his grantees of the spring lot defend the action now taken under the conceded right possessed by the owner of the intervening lot. The latter only could do that, and until he did it plaintiff was entitled to the accustomed use of the water. The following cases sustain this conclusion with more or less directness: 84 Mass. (2 Allen), 543; 89 id. (7 Allen), 277; 13 N. J. Eq., 439; 102 Mass., 90; 65 How, 154; 47 N. Y., 73; 3 Paige, 254; 2 Wash. on Real Property, 2d. ed., 38. *Conkhite v. Conkhite*, 94 N. Y. 323, and *Wiseman v. Luck-singer*, 84 N. Y. 31, simply sustain the power of the owner of the Beebe lot to revoke the license to carry the water through it.

Judgment affirmed, with costs.

Opinion by *Boardman, J.*; *Harden, P. J.*, and *Follett, J.*, concur.

#### PROMISSORY NOTES. ENDORSERS.

##### N. Y. COURT OF APPEALS.

*Wyckoff, applt., v. De Graff, respt.*

Decided Jan. 20, 1885.

Where an endorser of a promissory note has had the same discounted, and thereafter upon the request of the maker and a prior endorser, made before maturity, and upon their promise to give him a new note therefor, takes the old note up when it fall due and before protest, as he claims, to save their credit, *Held*, that the obligation primarily incurred by him was a contingent one, which did not prevent such an express contract, and to sustain it it is enough that at the request of the prior endorser something was done which originally the last endorser had not undertaken to do.

Where no objections are taken at the trial to directions sending the exceptions to General Term in the first instance, it is too late to object in this court that the case was not a proper one to be heard at General Term in the first instance.

Reversing S. C., 15 W. Dig., 484.

This is an action upon six promissory notes. It appeared that one S., at different times between January 22 and February 6, 1880, made certain negotiable promissory notes, payable four months after date, in the aggregate amounting to \$20,000; that he procured defendant to indorse them, and so indorsed they were, at the request of S., discounted by plaintiff, who transferred them for a valuable consideration to certain banks. On May 24, before the maturity of any of the paper, defendant stated to plaintiff that for causes mentioned he had become embarrassed and if he did not get help of those who held said notes he did not know how he would get through. On being informed that the notes were held by different banks he asked plaintiff to advance money and take them up, saying he would waive protest and give his own notes for the amount. After some further conversation plaintiff agreed to furnish the money to take up the notes, and in pursuance of that arrangement defendant waived protest, and as the several notes matured plaintiff advanced the money necessary to take them up. Defendant afterwards refused to give his notes for the amount, and thereupon plaintiff brought this action to recover the money so paid by him. Defendant denied that he requested

plaintiff to advance money or pay the notes, and gave evidence tending to prove that he indorsed the notes for the accommodation of S., and offered to show that they were discounted by plaintiff at usurious rates. This evidence was excluded and the judge in submitting the case to the jury said that the only question for them to pass upon was whether on the 24th of May defendant requested plaintiff to take up the notes and whether plaintiff on that request took them up, "if so he is entitled to a verdict, otherwise it will be for defendant." Defendant claims that as plaintiff was under a prior legal obligation to pay the notes his doing so, although at defendant's request, creates no liability on the part of the latter.

*W. I. Butler*, for applt.

*James R. Marvin*, for respt.

*Held*, Untenable; that the obligation primarily incurred by plaintiff was a contingent one; that it was not an obligation to defendant and he was not in any manner interested in its performance; that his obligations upon the paper did not prevent such an express contract as the one proved by plaintiff. It was not necessary to sustain it that it should appear that defendant acquired any actual advantage. It is enough that at his request something was done which originally plaintiff had not undertaken to do. 1 Taunt., 523; 4 id., 611; 9 C. B., N. S., 159; 10 id., 259; 6 H. & N., 295; 7 N. Y., 349; 59 id., 250; 45 id., 45. Plaintiff waived a right to which he was entitled, and so

enlarged his liability, and defendant received a benefit.

The respondent now objects that the case was not a proper one to be heard in the first instance at General Term, where a decision was rendered in his favor. It does not appear that he objected at the trial to directions sending the case to the General Term.

*Held*, That it is now too late to object.

Order of General Term, setting aside verdict for plaintiff and directing a new trial, reversed, and judgment ordered on verdict for plaintiff.

Opinion by *Danforth, J.* All concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. COURT OF APPEALS.

*Brick, admrx., respt., v. The Rochester, N. Y. & Pa. RR. Co., applt.*

Decided Feb. 10, 1885.

Intestate was in the employ of defendant engaged in repairing the track. The construction train on which he was riding ran off the track at a crossing where mud had been thrown on the track by passing wheels and had frozen, filling up the rails, and he was killed. One T., who was in charge of the train, was also general foreman of repairs and charged with the duty of seeing that crossings were properly cleaned and in safe condition, and this he had attempted to do. *Held*, that intestate in performing these services must be assumed to have understood the condition of the road and subjected himself to greater risks than he would have incurred under ordinary circumstances, and that T. in the duties he was performing at the time, was only a fellow-servant for whose negligence defendant was not liable.

This action was brought to recover damages for the death of B., plaintiff's intestate. It appeared that at the time B. was killed the railroad, over which he was passing in a car of defendant on which he was employed, had been allowed to fall into decay and was then in process of reconstruction. He was one of a number of laborers who were repairing the track and had been passing over it and was familiar with it. The train ran off the track at a crossing and the accident was attributable to the fact that rain had fallen the previous night, which caused the mud from passing wagon wheels to fill up the space alongside of the rails, in which the flanges of the wheels ought to run, and this mud froze solid and prevented the cars from passing along on the track. One T. was general foreman in reconstructing and repairing defendant's track and had the direction of the movements of its trains, and was charged with the duty of seeing that the crossings were properly cleaned and kept in safe condition for the passage of trains. He had charge of the train in question at the time of the accident, and had attempted to perform the service with which he was charged. The court held that defendant was liable for the negligence of T. and denied a motion to dismiss the complaint.

*Sherman S. Rogers*, for applt.

*F. C. Peck*, for resp't.

*Held*, Error; that B. in performing the services in which he was engaged and in traveling on the construction train may be

assumed to have understood the condition of defendant's road, and thus subjected himself to greater risks and perils than he would have incurred under ordinary circumstances. The obstruction on the track was not a defect of an intrinsic character, but one which arose from extrinsic and temporary causes for which defendant would not be liable: that T., in the capacity in which he acted, was only a fellow servant, and defendant was not liable for his negligence. The fact that T. had imposed upon him larger duties, embracing the construction of the entire road, does not alter his relation here. Even if T. may be regarded as representing defendant in some respects in reference to the road generally, the duties he was performing at the time of the accident were those of a fellow servant and not of the master, and if he was chargeable with negligence it was that of a fellow servant and not of the master. 81 N. Y., 516; 84 id., 77.

The court was requested and refused to charge that if T. knew of the defect in the crossing proven, and undertook to start the train without removing it, it was the negligence of a co-employee and plaintiff could not recover.

*Held*, Error.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Miller, J.* All concur; *Earl, J.*, on last ground. *Danforth, J.*, absent.

**FIRE INSURANCE. AGENCY.  
N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.**

**Mary Dietrick v. The Firemen's  
Fund Ins. Co., of San Francisco.**

Decided Jan., 1885.

An oral contract to insure property for one year against loss by fire by a written contract to be thereafter delivered, but to take effect immediately, is valid and if a loss occurs before the written contract is delivered the insured may recover on the oral contract.

When a principal, intending to create a special agent with power to do a single act, negligently executes and puts forth a general power of attorney under which the agent acts, the principal is bound as between himself and a third person acting in good faith.

Motion for new trial on exceptions ordered heard at General Term in the first instance after non-suit.

Action to recover for the loss of a building by fire. The complaint alleges that Feb. 25, 1882, defendant by its duly authorized agent orally agreed, in consideration of \$13 then paid, to insure plaintiff's unoccupied house and contents for one year from that date against loss by fire by a written contract thereafter to be delivered; that defendant failed to deliver a policy as agreed, and that Aug. 3, 1882 the property was burned. Evidence was given tending to prove these facts. It also appeared that the contract was made in the jail at Ithaca, where plaintiff and her husband were confined under sentences of imprisonment for one year in the Onondaga Co. Penitentiary, where they were taken Feb. 27 and remained until Dec. 23,

1882. On March 3 plaintiff executed and delivered to one O. a power of attorney to transact her business, rent buildings and land, sell personal property, insure building, pay for the insurance of the house, proceed with papers for the pardon of herself and husband and "for the transaction of my business of every name and nature."

March 8, 1882, defendant issued a policy on said house for one year. It provided that "No liability shall exist under this policy for loss on any vacant or unoccupied building, unless consent for such vacancy or unoccupancy be hereon endorsed." "Proofs of loss under this policy as herein required must be made and filed by the assured within 60 days from the date of the fire." "No action \* \* \* for the recovery of any claim by virtue of this policy shall be sustainable \* \* \* unless commenced within six months next after the loss shall occur." The loss, if any, was made payable to the mortgagee. In all these respects the policy differed from that called for by the oral contract. The uncontradicted testimony showed that this policy was exhibited by defendant's agent to O., who examined it and handed it to the agent to keep.

Plaintiff testified that she signed the power of attorney supposing it authorized O. to sell a colt, and that she did not ask to have it read over or explained to her. Neither O. nor S., by whom the power was witnessed, were called. It appeared by the evidence of plaintiff and her letters that O. acted for her in various matters until long

after the fire, when she became dissatisfied with him because of his inactivity in attempting to procure her pardon.

*M. N. Tompkins*, for. plff.

*S. D. Halliday*, for deft.

*Held*, That the motion should be denied. An oral contract to insure property for one year against loss by fire by a written contract to be thereafter delivered, but to take effect immediately, is valid, and if a loss occurs before the written contract is delivered the insured may recover on the oral contract. 24 Hun, 132; 90 N. Y., 280; 50 id., 402; 44 id., 538; 27 id., 216. Under the evidence and the admissions in the answer it cannot be held as a question of law that the agent was not authorized to enter into the oral contract declared on and testified to by plaintiff and her husband. 50 N. Y., 402; 59 id., 171; 16 Gray, 448; May on Ins., § 128. For the purpose of this motion it must be assumed that the agent had authority to bind defendant by an oral contract. The policy differed from the oral contract and was not a performance of it unless accepted as a performance by plaintiff or her agent. Of course if the power of attorney was a fraud it was not binding on plaintiff, and a person acting under it could not bind her unless she was negligent in executing and putting it within the power of O. to deceive others. When a principal, intending to create a special agent with power to do a single act, negligently executes and puts forth a general power of attorney, under which the agent acts, the

principal is bound as between himself and a third person acting in good faith. Assuming plaintiff's evidence as true, that she executed this short and simple power in the presence of a subscribing witness and others without asking to have it read or explained, she was negligent, even though unable to read it for herself.

Plaintiff did not ask to have the question submitted to the jury as to whether the agent knew of the existence of this power of attorney, or whether the policy was exhibited to and approved by O. Defendant's agent does not swear in express terms that he had seen the power of attorney before he submitted the policy to O. for his approval; but from the correspondence and evidence it pretty clearly appears that the agent knew of this power of attorney when he delivered this policy. This being so, the policy delivered was substituted for the oral contract and became the contract of insurance between the parties. That plaintiff did not comply with the conditions of the policy is undisputed. She did not furnish the proofs of loss, nor did she sue within six months after the loss, and the building was unoccupied at the time of the fire.

It is unnecessary to consider whether the policy was legally cancelled on June 2, 1882, or at any subsequent time before the fire, as plaintiff would not be entitled to recover even though it had remained uncanceled.

Motion denied and judgment ordered for defendant, with costs.

Opinion by *Follett, J.* ; *Hardin, P.J.*, and *Boardman, J.*, concur.

### APPEAL.

N. Y. COURT OF APPEALS.

Sloughton, *respt.*, v. Lewis, impled., *applt.*

Decided Feb. 10, 1885.

Where a demurrer was stricken out as frivolous and served in violation of a stipulation, and judgment was obtained by default, *Held*, that an appeal from the judgment alone brought up nothing for review.

The respondent is not precluded from moving to dismiss by the fact that he placed the case on the calendar and noticed it for argument.

This was a motion to dismiss an appeal in the above entitled action. It appeared that the action was brought to foreclose a mortgage. The complaint contained all the requisite allegations and was served upon the defendant L. He thereafter obtained a stipulation from the plaintiff's attorney for further time to answer, agreeing at the same time that he would not put in an answer, and would not ask for or apply to the court for any further extension of time. On the last day given by the stipulation L.'s attorney served a demurrer, which alleged that the complaint did not state facts sufficient to constitute a cause of action. Thereafter plaintiff's attorney moved at Special Term to overrule and strike out the demurrer on the ground that it was frivolous and served in violation of the stipulation. This motion was granted and plaintiff proceeded as if no demurrer or answer had been in-

terposed and obtained a judgment of foreclosure by default. L. appealed therefrom to the General Term, where the judgment was affirmed, and from the affirmance there to this court. No appeal was taken from the order striking out and setting aside the demurrer.

*Augustus Haviland*, for motion.

*Franklin Bien*, opposed.

*Held*, That the order overruling the demurrer remains in force and cannot be assailed on this appeal ; the appeal from the judgment therefore brings up nothing for review.

It was claimed that plaintiff was precluded from making this motion because he noticed the case for argument and placed it upon the calendar.

*Held*, Untenable ; that he waived nothing by so doing. It was still optional with him to wait until the case was reached on the calendar, or to make this motion on the ground that an appeal to this court from such a judgment was not authorized.

Motion granted.

Opinion by *Earl, J.* All concur.

### LIMITATIONS.

N. Y. COURT OF APPEALS.

De Freest, *respt.*, v. Warner et al., admrs. *appls.*

Decided Feb. 10, 1885.

One W., who was indebted to plaintiff, conveyed certain real estate to his sons by deed which charged the land with and the grantees assumed to pay said indebtedness with interest. *Held*, That the acknowledgment of the indebtedness, although made to strangers to it, was just as effectual to defeat the statute of limit-

ations as if it had been made directly to plaintiff or his authorized agent, as it was intended to be communicated to and influence him.

This action was upon four promissory notes made by W., defendant's intestate, in 1871, 1872 and 1873, the last of which fell due in April, 1874. Defendants set up as a defence the statute of limitations. Plaintiff introduced in evidence a deed of a farm dated April 2, 1875, executed by W. to his three sons, which recited that the conveyance was made "subject to the following amounts due by me to the parties hereinafter specified, which forms a part of the consideration above expressed, and which I charge the above estate above conveyed with the payment thereof and which said several amounts, together with the interest, the said parties of the second part assume and agree to pay; to Daniel De Freest about \$600, to Mrs. De Freest about \$400, together with the legal interest thereon." It was not questioned that the debts the grantees had assumed to pay were the notes in suit. A motion to non-suit was denied and a verdict directed for the amount of the notes.

*Amasa J. Parker*, for applts.

*Matthew Hale*, for resp't.

*Held*, No error; that although the acknowledgment of the indebtedness was made to a stranger, as it appeared it was intended that it should be communicated to and influence the holders of the notes, it is just as effectual to defeat the statute of limitations as if it had been made directly to them or

their authorized agent. 9 N. Y., 85; 7 Hun, 230; 1 Smith's L. Cas., H. & W. Notes, 975.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Earl, J.* All concur, except *Rapallo, J.*, dissenting, and *Danforth, J.*, absent.

#### EXECUTORS. CONTEMPT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re William H. Snyder, exr.*

Decided Dec., 1884.

The proceeding by attachment, under the Revised Statutes, to enforce a Surrogate's decree, has been suspended by § 2555 of the Code. Under this section a Surrogate may by order punish for contempt a refusal or wilful neglect to obey his decree. This section applies to the case of an executor whose trust was created, and whose wrongful acts in the trust were done, before this statute went into operation, but who was called to account thereafter.

Appellant was executor of one Olmstead; he received property belonging to the deceased. He was called to account, accounted, and in March, 1882, the Surrogate made a decree adjudging that there was a certain sum in his hands, and directing him to pay it to certain persons. The decree was served on him and payment demanded; he has not paid. A transcript of the decree was filed in Rensselaer County Clerk's office, execution issued, and returned unsatisfied. Upon the ground of wilful neglect to obey the decree proceedings for contempt were taken before the Surrogate. On the return day the executor presented an

affidavit setting forth that he had, in 1876, lost the moneys of the estate, which he had put in his own business; that he had tried to get money to make good the loss, but had failed. Of these facts there was no evidence beyond this affidavit.

In reply the parties interested in the estate presented affidavits tending to show that in 1878 the executor had conveyed valuable property to his wife for a slight consideration, of which property she was then in possession, and upon which he and she resided. The Surrogate fined the executor the amount of the deficiency, and ordered him committed to jail until the fine was paid.

*J. Lansing*, for applt., exr.

*J. A. Cipperly*, for respts.

*Held*, That the matter rested with the Surrogate, and that his power has been wisely exercised. Under Code, § 2552, the decree was conclusive evidence that there were sufficient assets in the hands of the executor to satisfy the sum directed to be paid. The evidence of the inability to pay was very unsatisfactory. The executor admits a breach of trust in having used the money himself. Under the Revised Statutes the decree of a Surrogate was enforced by attachment, and there was some doubt as to his exact powers. But under the Code that practice is superseded and by § 2555 the Surrogate can punish for contempt one who refuses or wilfully neglects to obey his decree (see subdivs. 3 and 4). These sections took effect Sept. 1, 1880, and apply here, al-

though the trust was created before that time. The statute is only remedial. 91 N. Y., 235.

Order affirmed.

Opinion by *Fish, J.*; *Landon, J.*, concurs; *Learned, P.J.*, dissents.

#### AGENCY. SET OFF.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Charles B. Nichols, *respt.*, v. Nelson Martin et al., *appls.*

Decided Jan., 1885.

A. had in his possession certain wheat which he treated as his own and sold to defendants, taking their note to himself for the price. Defendants supposed the wheat belonged to A., but his wife was the real owner. Defendant afterward purchased a note made by A., which they proposed to set off against their note, held by A. On suit upon defendant's note, *Held*, they could not set off more than the amount they actually paid for A.'s note.

Appeal from judgment on verdict at Circuit, and from order denying new trial.

A. sold defendants some wheat which he had in his possession, but which belonged to his wife. He did not disclose to defendants that he was not the owner, or that he was transacting the business otherwise than in his own right. In payment he took defendants' note payable to his order, and when it came due he called on them for payment, and they proposed to set off against his claim so much as necessary of a note of A.'s for \$172, which they had purchased since the sale of the wheat. They paid but \$5 for the note. A. transferred defendants' note to plaintiff,



who brought this action on it. Defendants claimed the right of set-off as above, but the court directed a verdict for plaintiff for the amount of the note sued on. A. had failed four years before, and defendants knew it.

*George Barrow*, for appls.

*Sereno E. Payne*, for resp't.

**Held**, Error. When a person has actual possession of personal property, with apparent control of it, and deals with it and makes sale of it apparently as principal, when he is in fact agent of another, the purchaser may treat the agent as the owner, and in an action by the principal for the price may set off a claim he has against the agent, provided the purchaser in good faith supposed the agent was owner, and there were no circumstances which could put him upon inquiry or charge him with negligence in not suspecting or ascertaining that the seller was agent only. 7 Tenn., 359; *id.*, 360; 1 Q. B., 197; 4 Barn. & C., 547; 24 Wend., 458; 26 How., 513; 20 Hun, 126; 97 Penn. St., 309; 7 Cush., 371. See 4 Maule & S., 566; 2 Barn. & Ald., 137; 7 Bosw., 339; 9 *id.*, 415; 51 Barb., 244; 2 Cai. Cas., 341; 89 N. Y., 570. Defendants were not chargeable with suspicion as to ownership. They purchased the note without knowledge that A. was not the owner of the wheat. But they were entitled to set off only what they paid for A.'s note. 7 Johns. Ch., 65; 1 Barb. Ch., 105; 1 Cow., 622; 24 Wend., 464. This they did not do, but asked to set off enough of the note held by them to satisfy plaintiff's demand.

Defendants had the right to have the question of fact submitted to the jury if they desired it and so requested. But it seems by the record that they did not ask that any question go to the jury; they treated the questions presented as those of law only. They cannot now raise any questions other than of law upon their exceptions to refusal to direct a verdict for defendants and to the direction of verdict for plaintiff. 12 N. Y., 18; 43 *id.*, 85; 78 *id.*, 287. The evidence is sufficient to authorize and support a verdict for plaintiff.

Judgment and order affirmed.

Opinion by *Bradley, J.*; *Haight* and *Childs, JJ.*, concur.

#### RAILROAD PASS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Benjamin McElwain, plff., v. The Erie R. Co., def't.*

Decided Jan., 1885.

Where a railroad corporation relies upon a release from damages resulting from the negligence of its employees contained in a pass the conditions of the pass must be established affirmatively.

An agent of a railroad company, when testifying in its behalf, is within the rule requiring the credibility of interested witnesses to be submitted to the jury.

A railroad pass contained this provision: "The acceptance of this pass is to be considered a waiver of all claims against the Erie Railway Company for personal damages and injuries received when on the above train." **Held**, Not to release the company from the results of its employees' negligence.

Motion by plaintiff to set aside non-suit granted at Circuit. Ex-

ceptions ordered heard here in first instance.

Action for damages occasioned by personal injuries to plaintiff while a passenger on defendant's road, caused by negligence of defendant's employees.

Plaintiff was riding on a stock pass. The evidence tended to show negligence on defendant's part. The pass was lost, and the only witness who testified as to its contents was B., defendant's station agent, who issued the pass eighteen years before the trial, and the effect of his evidence is, at most, that his recollection was that at the time the pass was issued passes in a certain form were issued to drovers who shipped cattle under a special contract like the one made with plaintiff. The form of pass described by the witness contained the clause: "The acceptance of this pass is to be considered a waiver of all claims against the Erie Railway Company for personal damages and injuries received when on the above train."

*Cook & Lockwood*, for plff.

Defendant not appearing on argument.

*Held*, It was incumbent on defendant to establish clearly and beyond doubt that the pass contained a release exempting it from damages arising from personal injuries to one of its passengers by reason of the negligence of its own servants. The agent's evidence should be scanned with the closest scrutiny to see if it establishes such release. No presumption can be made in defendant's favor as to the conditions of the pass. There was a question

for the jury whether the pass contained the release as contended by defendant.

Moreover, the question of the agent's credibility should have been submitted to the jury, he being an agent of the company, making the contract, and in its employ when he testified in its behalf. 45 N. Y., 549; 92 N. Y., 621.

Conceding the pass to have been in the form claimed by defendant, it does not constitute a defence. It does not in specific terms contain a release from damages arising from defendant's own negligence or the negligence of its agents and servants. See 25 N. Y., 442; 7 Hill, 533; 8 N. Y., 375; 66 id., 313; 71 id., 180; 86 id., 275; 90 id., 270.

Non-suit set aside and new trial granted, costs to abide event.

Opinion by *Barker, J.*; *Bradley, J.*, concurs; *Haight, J.*, not voting.

#### ASSIGNMENT. CREDITORS. FRAUD.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

*M. Amanda Swift et al., admrs.,  
respts., v. Edward C. Hart et al.,  
appls.*

Decided Jan., 1885.

Assignment to H. by an insolvent debtor of securities for payment for legal services to be performed by H. for the insolvent in the event of an assignment by the latter for the benefit of creditors, *Held*, To be a fraud on creditors of the insolvent.

Where the securities so assigned were judgments which had been recovered by H. as attorney for the insolvent, *Held*, That H. still had his lien upon such judgments for his compensation and disbursements therein.

Upon refusal by the assignee to bring an action to reclaim property fraudulently assigned by the insolvent, creditors may sue in equity for that purpose, joining the assignee as defendant, and the proceeds of their recovery will be assets for distribution under the assignment.

Appeal from judgment on referee's report.

On Jan. 5, 1883, Schad made written transfer to defendant Hart of judgments worth \$800, reciting that Schad was indebted to Hart \$200 for legal services, and desired to retain him in proceedings and litigation that might arise in matters relating to a general assignment of Schad for the benefit of creditors, and, Hart desiring payment therefor, and consenting to take those judgments as payment in full for such services and retainer, such transfer was made. And it was provided that if any surplus remained after such payment, Hart should hold it as collateral to notes held by him, indorsed by Schad. Next day Schad conveyed property to other parties, and on Jan. 8, made a general assignment for benefit of creditors to defendant Stebbins. Plaintiffs are judgment creditors of Schad, and brought this action to set aside the transfer to Hart as a fraud on creditors, and recovered judgment to that effect.

*W. L. Marcy*, for applt. Hart.

*Ellsworth & Potter*, for applt. Stebbins.

*David Miller*, for respts.

*Held*, That Hart had a perfect right to obtain preference for the debt due him. 61 N. Y., 626; 76 id., 213; 48 Barb., 344; 7 Hun, 591; 14 id., 172; 30 id., 192; 31

id., 65; 115 Mass., 505; Wait on Fraud Con., § 390. But the reservation of property to pay for professional services which might be thereafter required was, to that extent, a fraud on the creditors. 2 Abb. Dec., 11; 3 Keyes, 398; 1 Sandf. Ch., 83; 3 Barb. Ch., 644; 4 N. Y., 211; 15 id., 132; 17 id., 22. It is not within the rule giving effect and validity to security for future advances. 6 N. Y., 147. The instrument cannot be supported as security for the existing debt if Hart was chargeable with actual intent to defraud Schad's creditors, but is wholly void in that event. 87 N. Y., 620. The referee found such intent, and the evidence seems to support the finding.

Hart, as attorney for Schad, recovered the judgments so assigned, and had liens upon them respectively for his compensation and disbursements therein, Code Civ. Proc., § 66, with the right to retain sufficient of the money collected on them to satisfy the liens. 51 N. Y., 140; 52 id., 489; 85 id., 284; 89 id., 509. The lien is not extinguished by the transfer of the judgments, such transfer having been void. 64 N. Y., 294; 49 id., 111; 3 Metc., 40.

By force of the statute of 1858, the assignee is a trustee for the creditors to the extent of the power conferred as effectually as if his appointment had been made by or pursuant to law vesting him with title for the purposes of the trust. 72 N. Y., 424; 98 U. S., 20. The remedy of individual creditors in respect to property fraudulently

transferred is taken from them and devolved upon their trustee, and their rights are subject to the direction for distribution given by the assignment. 11 N. Y., 237; 2 Hill, 181; 30 Hun, 227; 32 id., 267; 90 N. Y., 538; 20 W. Dig., 22. The assignee's refusal to bring action does not divest him of the right to property as trustee, nor give individual creditors the right to appropriate the proceeds resulting from their action to the payment of their judgments. But, on such refusal, creditors may sue in equity to reclaim the property wrongfully transferred, making the assignee a defendant, and the proceeds of their recovery are assets for distribution pursuant to the direction of the assignment. 11 N. Y., 237; 15 Penn. St., 385; 51 How., 177; 12 Hun, 75; 18 Wall. 627; 72 N. Y., 70. The assignee's refusal does not necessarily charge him with bad faith, and he seems to have acted fairly within his discretion and without collusion.

Judgment modified so as to adjudge that whatever lien Hart had on the judgments at the time of and before their transfer to him may be ascertained by reference; that Hart pay over to the receiver the money collected by him, if any, less the amount which he is entitled to retain to satisfy such liens; that after paying his fees and expenses, the receiver, with the residue of the proceeds of those judgments, pay, First: To plaintiffs their taxable costs in this action, with any additional allowance there may be. Second: To defend-

ant Stebbins, if sufficient thereof remain, his taxable costs of this appeal. Third: To defendant Hart, if sufficient thereof remain, his taxable costs of this appeal; and Fourth: The residue, if any, to defendant Stebbins as assignee. Judgment as modified, affirmed without costs to either party as against any other, except as above mentioned.

Opinion by *Bradley J.*; *Barker* and *Haight, JJ.*, concur; *Rumsey, J.*, dissents.

#### PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John F. Henry et al., *appls.*, v. Edwin J. Dunning, *respt.*

Decided Jan. 9, 1885.

When the court, on a motion made upon the pleading at the trial, dismisses one cause of action stated in the complaint, and directs a verdict for another which is admitted, and plaintiff's counsel takes no exception to this disposition of the case, but acquiesces therein, the judgment cannot be reversed upon appeal, although considered erroneous by the appellate court.

Appeal from judgment entered upon dismissal of complaint at circuit, and from order denying motion for a new trial.

The first cause of action stated in the complaint was on an account stated. The answer alleged a release, and, a reply being required, plaintiff alleged that the consideration for such release was certain promissory notes which had not been paid, and asked leave to reduce the demand to the amount of such notes and demanded judgment therefor.

Upon the trial, on motion of defendant's counsel, the court dismissed the complaint upon the pleadings as to the cause of action above stated, and plaintiff's counsel then said, "Then we will take a verdict for the \$125, and will bring an action on the notes."

The court then directed a verdict in favor of plaintiffs for \$125, which was a conceded indebtedness set forth as a second cause of action in the complaint. No exception was taken to the ruling of the court dismissing the complaint, nor to the direction of the verdict for the amount stated.

*Thorndike Saunders*, for applt.  
*M. W. Divine*, for respt.

*Held*, That although upon the pleadings as they stood, their allegations being virtually admitted on the trial, the ruling of the court was probably erroneous, still not only was no exception taken, but plaintiff's counsel acquiesced in the ruling, and, upon this state of facts, the judgment and order could not be interfered with.

Judgment and order affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

#### NEGOTIABLE PAPER. NOTICE.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

The Discount & Deposit Bank of Clarion, *plff.*, v. Samuel Oosterhoudt et al., *defts.*

Decided Jan., 1885.

An oral agreement made at or before the time of indorsement and delivery of a  
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promissory note is not competent to modify the import of the indorsement.

The knowledge of a director or stockholder of a bank will not charge the bank with notice unless he is acting for and in the business of the bank.

Motion by defendants for new trial on exceptions taken at Circuit and ordered heard here in first instance.

Action against defendants as indorsers of certain promissory notes.

In 1874 defendants negotiated the purchase of lumber from Cobb & Son, which was finally consummated by agreement with H. & L., and defendants gave them four notes, dated May 8, 1874, made by defendant A. and indorsed by defendant O., due at 4, 6, 8 and 10 months. By written agreement then made between defendants and H. & L. it was agreed that the notes be left at the German National Bank, with liberty to defendants to pay any amount on them before maturity and be allowed to deliver in payment any notes indorsed by them. Defendant A. testified that it was further agreed that the notes of others so indorsed and delivered by defendants should if possible be collected of the makers, and that proceedings should be diligently taken for that purpose, and that until such remedy should be exhausted no resort should be had to defendants. The evidence tended to show that this further agreement was in writing and had been lost. Defendant A. subsequently offered at the German Bank to pay some of the notes in money and with notes indorsed by defendants. The bank refused to take notes, and referred him to

plaintiff as owner of the notes made by him. He went to plaintiff to take them up with money and notes and called the cashier's attention to the agreement with H. & L. The cashier refused payment in notes and referred defendant to H. & L., saying any arrangement with them would be all right. Defendant so arranged with H. & L. and Cobb that defendants paid them \$2,200 in money, gave their note for \$2,400, and indorsed and delivered to them the notes in suit. It was then orally agreed between defendants and H. and Cobb that when the notes so indorsed became due, if they were not paid, proceedings should at once be taken against the makers, and that there should be no resort to defendants until the remedy against the makers was exhausted. No effort was made to collect of the makers. The court directed verdict for plaintiff.

*D. H. Bolles*, for defts.

*C. S. Cary*, for plff.

*Held*, No error. There is nothing to bring the transaction within any principle which can cast suspicion on the *bona fides* of plaintiff's title, or to require proof that it became the owner in good faith for value. 45 N. Y., 762; 76 id., 279. Even if the parties to whom the notes were given had brought this action, it is very questionable whether the oral agreement would have afforded defendants any defense as against their written endorsement. 8 Johns., 190; 5 Wend., 187; 14 id., 26; 27 Barb., 489; 18 Hun, 151; 84 N. Y., 655.

A careful examination of the ev-

idence fails to disclose that plaintiff owned the lumber, that H. & L. were acting for the bank in making the sale, or that plaintiff took the paper with notice of any agreement other than that imported by the indorsements themselves. The fact that H. was a stockholder and L. a stockholder and director of plaintiff does not charge plaintiff with notice of their transactions with defendants, or qualify the presumption of plaintiff's good faith. 55 N. Y., 24; 73 id., 226. See 18 W. Dig., 538.

Motion denied and judgment on verdict ordered for plaintiff.

Opinion by *Bradley, J.*; *Childs, J.*, concurs.

#### TRESPASS. TITLE. COSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William H. Crowell, *respt.*, v. Ephraim W. Smith, *applt.*

Decided Jan., 1885.

Plaintiff's complaint alleged a wrongful cutting of timber by defendant on lands owned and occupied by plaintiff, named the damage and demanded "judgment for treble damages, amounting to \$250." The answer was a general denial. The verdict assessed plaintiff's actual damages at \$12.50, and awarded him treble damages. *Held*, A claim of title was raised upon the pleadings within § 3228, subd. 1, Code Civ. Pro.

Appeal from Special Term order, denying motion to set aside taxation of costs in favor of plaintiff, and for direction to tax and allow them in favor of defendant.

The question is whether a claim of title to real property arose upon the pleadings within the meaning

of Code Civ. Pro., § 3228, subd. 1. The complaint alleged that defendant wrongfully entered upon lands owned and possessed by plaintiff, and wrongfully cut, etc., growing trees to plaintiff's damage \$100, "wherefore the plaintiff demands judgment for treble damages, amounting to \$250." The answer denied each and every allegation of the complaint. The jury by their verdict said they "assess the actual damages of the plaintiff at \$12.50, and that the plaintiff is entitled to recover treble damages." No certificate was made that title to real property came in question on the trial. Each party claimed costs. The clerk allowed and inserted plaintiff's costs in the judgment, and denied defendant's application in that respect.

*Jacob Decker*, for applt.

*A. P. Rich*, for respt.

*Held*, The question here depends wholly on the provisions of the Code of Civ. Pro., it not appearing that this action was begun prior to Sept. 1, 1880. Laws 1880, Chap. 245, § 1. The right to recover treble damages is given by §§ 1667-8 of the Code. This right is in the owner alone. 1 Den., 639; 29 N. Y., 9. And for that purpose plaintiff may state in his complaint the amount of his damages and demand judgment for treble the sum stated. And nothing more is required to bring the case within the statute. Code Civ. Pro., § 1668. Treating that form of demand as characterizing plaintiff's claim in the complaint as that of owner only, then by the answer a claim of title to real property arises on the plead-

ings within § 3228, subd. 1. The rule should prevail that his right to recover must depend upon proof of title in plaintiff, although he seeks on the trial to recover and does recover single damages only. See 25 How., 289. This supports plaintiff's right to costs upon the pleadings. See 43 How., 33.

Defendant's denial of the complaint alleging injury to the inheritance raises a claim of title to real property on the pleadings, although plaintiff alleges possession as well as title. 81 N. Y., 233.

The stipulation made by the attorneys after the issue, to the effect that plaintiff might prove treble or single damages the same as if the complaint was sufficient for that purpose, and that defendant might prove good faith the same as if the answer was sufficient, and that defendant is not to dispute the title, cannot be treated as part of the pleadings.

Order affirmed.

Opinion by *Bradley, J.*; *Barker, Haight* and *Lewis, JJ.*, concur.

#### SALE. FRAUD.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*William Manning et al., applts., v. Peter Ennis et al., respts.*

Decided Jan., 1885.

A vendee in good faith, trusting to his vendor's statement that he owes no debts, is not bound, in favor of the vendor's creditors, to make further inquiries and investigate the vendor's condition.

Mere inadequacy of price is not enough to set aside a sale as a fraud on creditors. Possession by the vendor after sale of per-

sonal property does not render the sale void as against creditors if the transfer was made in good faith.

Appeal from judgment on Special Term decision.

Action by creditors of defendants Ennis to set aside as fraudulent as against creditors of those defendants a sale of personal property made by them to defendant Phelps. The court below held that the sale was not fraudulent and dismissed the complaint on the merits. Defendants Ennis, on March 25, 1881, occupied a farm to which they held title which was heavily mortgaged, one of the mortgages for \$6,500 coming due April 1, following. They had a quantity of live stock, farming tools, etc. They had before mortgaged their horses to secure a debt of \$111, which was then due, and a judgment had been recovered against them by one T, for \$125, on which execution had been levied on the horses and other property, and a sale thereunder was advertised for March 26. They sold their personal property and 37 acres of wheat then growing on the farm to defendant Phelps on March 25, for \$241, the amount needed to satisfy the chattel mortgage and the execution. Upon inquiry by Phelps of the vendors they told him they owed no other debts than as above described, and he had no knowledge of any others. Plaintiff's judgment was recovered on a pre-existing debt on March 31, and at the time of the sale to Phelps the judgment debtors owed other debts and were insolvent. The trial court found

the value of the property sold, exclusive of the wheat, and exclusive of what was not subject to levy and sale on execution, was \$320. Within a week after the sale Phelps took actual possession of the property, but some of it was afterwards returned to the farm and taken care of there, and some of it was used by defendants Ennis on the farm in which Phelps had become interested, and Phelps afterwards sold some of the property to the wife of one of them.

*H. H. Woodward*, for applts.

*L. H. Hovey*, for respts.

*Held*, That no active diligence of the vendee was required as against creditors to investigate the vendors' purpose and situation. Imputation of fraud on the vendee's part arises from actual notice only, but that may be inferred from circumstances. 93 N. Y., 118. Inadequacy of price is a fact to be considered, but is not sufficient alone to support a charge of fraud. 52 N. Y., 274; 6 Hun, 97. The inadequacy, if any, in this case is not such as to shock the moral sense and furnish evidence of fraud.

The sale cannot be treated as a security with a view to an accounting by Phelps. See *Leet v. McMaster*. 51 Barb., 236.

*Davis v. Leopold*, 87 N. Y., 620; *Boyd v. Dunlop*, 1 Johns. Ch., 478; *Van Wyck v. Baker*, 16 Hun, 169, distinguished.

The subsequent possession by the vendors does not render the sale fraudulent and void under 2 R. S., 136, § 5. 55 N. Y., 107.

Judgment affirmed, with costs.



Opinion by *Bradley, J.; Barker, Haight and Lewis, JJ.*, concur.

# RAILROAD. EMINENT DOMAIN.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*In re* petition of the N. Y., L. & W. RR. Co. for appointment of Commissioners to appraise lands of the Union Steamboat Co.

Decided Jan., 1885.

A certified copy of the articles of association of a railroad company, showing that some of the requisite twenty-five names were subscribed by persons other than those bearing the names so signed, *Held*, to be *prima facie* evidence that the names subscribed were genuine, and that the signatures were authorized.

It is sufficient in that respect if the articles of association state the length of the road approximately.

A railroad corporation may lease its property and transfer its management to a foreign railroad company, even for the whole term of its existence; and the fact of such lease does not take from the lessor company the right to condemnation of land for its uses.

The selection of lands for its use is in the discretion of the corporation, and if the same is made in good faith and there is a necessity of acquiring the lands, and the same are suitable, the courts will not interfere.

Appeal by repliant from Special Term order confirming referee's report and appointing commissioners to fix compensation.

Petitioner is a corporation organized under the general laws of New York. These proceedings were instituted to acquire title to the lands in question for the purpose of erecting warehouses to receive freight, etc., in the operation of petitioner's road. The premises

have a frontage of 322 feet on Buffalo river, and it is undisputed that so much frontage is necessary to petitioner, which already owns property adjacent to that in question. Appellant does an extensive transportation business upon the great lakes. This property is particularly well adapted to appellant's Buffalo city business, which amounts to about 8 per cent. of its whole business, and in which it will probably suffer loss if compelled to move. Prior to the commencement of these proceedings petitioner leased its road and transferred the operation of it for the whole term of its existence to the Delaware, Lackawanna and Western RR. Co., a Pennsylvania corporation. A certified copy of petitioner's articles of incorporation was read in evidence, which showed that of the twenty-six names subscribed thereto, four purported to be signed by persons other than the owners of the names. The articles mentioned the termini of the road, and stated that the length of the road and branches "is to be about three hundred miles." The affidavit attached thereto stated that "at least one thousand dollars per mile for every mile of railway proposed to be constructed—to wit, three hundred miles, has \*\*\* been subscribed." The referee found that petitioner was duly created a corporation under the general statutes of this State, and that the property in question was necessary for the uses set forth in the petition.

*George S. Hibbard*, for applt.

*Bowen, Rogers & Locke*, for respt.

*Held*, That by force of the statute *prima facie* proof was made by the certified copy of the articles of association that all the names subscribed were genuine, and that the subscription of the four names by others was duly authorized by the owners of the same.

The length of the road was stated with sufficient exactness within the requirements of the statute.

The lease and transfer were within the power of petitioner. Laws 1839, ch., 218; 93 N. Y., 616; 77 id., 234; 86 id., 107; 46 id., 644. The fact that the lessee is a foreign corporation does not vitiate the lease. 16 Abb., N. S., 249; 92 N. Y., 324; 95 id., 175.

The lease and occupation thereunder by the lessee do not take away petitioner's right to resort to the power conferred upon it by the law of its organization—to condemn lands necessary for the use and operation of the road, and to enable it to carry out the objects of its formation, and to discharge its duties to the public. The execution of the lease did not terminate the corporate life. 80 N. Y., 27; 6 Hun, 27; Mills Em. Dom., § 63.

The necessity and extent of the appropriation of land are for the courts to determine. But when the necessity is shown to exist, and reasonable discretion has been exercised by the corporation, and it has acted in entire good faith, as here, in its selection, the courts will not interfere. 66 N. Y., 409; 43 id., 137; 77 id., 264. See 46 N. Y., 555. Appellant can be com-

pensated for its loss by what it will receive for the property taken.

Order affirmed, with costs and disbursements.

Opinion by *Barker, J.*; *Bradley, J.*, concurs; *Smith, P.J.*, and *Haight, J.*, not sitting.

#### ASSIGNMENT FOR CREDITORS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*J. D. Kurtz Crook, applt.*, v. *Leopold Rindskopf et al, respts.*

Decided Jan. 9, 1885.

A general assignment for the benefit of creditors, made by the members of a copartnership, including both the partnership and their individual property, and containing a provision that, out of the remainder of the assets, if any, after paying the partnership debts, the assignee should pay their individual debts, or, if such remainder should be insufficient, should apply the same *pro rata* to the payment of such individual debts, is fraudulent when the individual property and liabilities of the assignors are unequal, for the individual property of such assignors should be applied to the payment of his individual liabilities; and such an assignment may be set aside in a suit brought for that purpose by a judgment creditor of the copartnership.

When a general assignment for the benefit of creditors contains a fraudulent direction, any creditor, even though the fraudulent direction itself may not directly prejudice him, is entitled to relief under the general provision of the statute declaring an assignment made with the intent to hinder, delay or defraud creditors to be void as against the persons so hindered, delayed, or defrauded, for every creditor is so delayed and hindered by such an assignment, inasmuch as it stands in the way of the ordinary legal proceedings provided for the collection of debts.

Appeal from judgment recovered on trial before the court.

Plaintiff was a judgment creditor of a co-partnership composed of the defendants Rindskopf and Rosenthal. Executions issued upon his judgment were returned unsatisfied, and he thereafter brought this action to set aside as fraudulent a general assignment executed by said defendants, including both the co-partnership and their individual property. This assignment contained a clause directing the assignee, out of the residue of the assets remaining after the payment of the co-partnership debts, to pay the individual debts of the assignors, or, if such residue should be insufficient, to apply the same *pro rata* to the payment of such individual debts, and it was claimed by plaintiff that this direction rendered the assignment fraudulent and void, inasmuch as it appeared that the assignors individually owed unequal amounts of debts, and that the property individually owned by each of them was unequal, and that their respective accounts with the co-partnership were likewise unequal, and, therefore, compliance with this direction would, so far as the individual indebtedness of one of the assignors should exceed that of the other, be to apply or appropriate a portion of his individual interest in the assigned property to the payment of the creditors of the other debtor for which such individual interest would not be legally liable. It was urged in support of the assignment that as plaintiff was a creditor of the firm and not of either of the individual partners, and the effect of the assignment might be to

devote additional property to the payment of his debts, or in any event that he would not be injured by this direction concerning the payment of the individual debts of the partners, he could not complain of it, inasmuch as he would not be hindered, delayed, or defrauded thereby.

*Edward T. Bartlett*, for applt.

*Adolph L. Sanger*, for respts.

*Held*, That the direction in the assignment in regard to the payment of the individual debts of the assignors was fraudulent.

That where an assignment of the debtor's property is fraudulent on account of one or more directions contained in it, there every creditor is certainly hindered or delayed by a fraudulent instrument. That the property of the debtors in that manner is taken from their possession and control and placed in charge of an assignee, to be disposed of and administered by him in the settlement of the debts and claims of creditors. That if the assignment is allowed to stand, then the creditors will necessarily be delayed until that settlement shall take place, and that delay will result where one or more of the directions may be unlawful in hindering and delaying the creditor, although not actually defrauded, and that by the language of the statute (3 R.S., 6th ed., 145, § 1,) would entitle him legally to complain of the validity and effect of the assignment. That he would be hindered and delayed in the ordinary course of proceedings for the collection of his debts by the interposition in his way of a fraudulent disposition of

the debtors' property, and by the terms of the statute would have the right to insist upon the fraudulent obstruction being removed. 25 Hun, 246; 20 How., 121; 5 Com., 547; 11 Wend., 187; 4 Com., 211; 16 N. Y., 484.

*Morrison v. Atwell*, 9 Bos., 503; *Scott v. Guthrie*, 10 Bos., 408; *U. S. v. Victor*, 16 Abb., 153; *Cox v. Platt*, 32 Barb., 127, criticized and not followed.

*Turner v. Jaycox*, 40 Barb., 164; *affd.* 40 N. Y., 470, distinguished.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

*Brady, J.*, dissents, upon the ground that if the provision discussed created a presumption of fraudulent intent, it was not conclusive, 40 N. Y., 475, and that, since it was shown that the partnership property was not sufficient to pay the partnership debts, the presumption was overcome.

#### DEEDS. EVIDENCE.

#### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Daniel C. Case, applt., v. Wealthy Dexter et al., respts.*

Decided Jan., 1885.

When a general description in a deed is inconsistent with a particular description, the particular description prevails.

When an uncertainty arises, not from the terms used, but as to the subject to which they are applied, oral evidence is admissible to identify the subject.

Appeal from judgment in favor of defendant, entered on verdict directed by the court.

Action for trespass, commenced in this court after discontinuance of similar action in justice's court on plea of title in defendant Dexter.

The premises in question consist of about seven acres of land, lying north of Fish lake, and in lot No. 3 in the township of Lysander and town of Granby. Feb. 10, 1882, defendants entered upon this land and cut timber of the agreed value of \$2. Lot 3 contains 600 acres, all of which is covered by Fish lake except about 67 acres lying south and about 7 acres lying north of the lake. Defendant Dexter is the owner and in possession of the 67 acres, and claims to be the owner and entitled to the possession of the 7 acres. The lake is about one mile in width between the two parcels of land.

Plaintiff received a deed of the land in question June 11, 1877, and fenced it, and has occupied it as farming land ever since. The deed under which Mrs. Dexter acquired land on lot 3, and the preceding deed, describe the subject of the grant as a parcel of land containing 67 acres, more or less, being on lot 3, commonly known as the Fish lake lot. The other deeds in her chain of title, describe it as, "All that certain piece or parcel of land situate, lying and being in the town of Granby, county of Oswego, and known as being lot No. 3, in the original township of Lysander, lying southerly or southeasterly of Fish lake, in Granby aforesaid, and commonly called 'the Fish lake lot,' sup-

posed to contain 67 acres, be the same more or less."

*Giles S. Piper*, for applt.

*S. N. Dada*, for respts.

*Held*, That the direction of a verdict for defendant was clearly erroneous; that the facts as to plaintiff's occupation were undisputed and *prima facie* are sufficient to entitle him to recover. It cannot be said, as matter of law, that under her deeds Mrs. Dexter acquired title to the whole of lot No. 3, 600 acres, instead of 67 acres. In the deed to Mrs. Dexter, and in the preceding deed, the words used are, "And being on lot 3," which do not naturally embrace the whole of lot 3. In exhibits A., B., C. and D. the words are, "And being known as lot No. 3." In all of the deeds constituting defendant's chain of title the words of general description are followed by words of particular description, to wit: "Lying southerly or southeasterly of Fish lake, in Granby aforesaid, and commonly called the Fish lake lot, supposed to contain 67 acres of land, be the same more or less." These words, particularly describing the location of the subject of the grant, locate it southerly of Fish lake, which excludes the idea that the grant embraced 7 acres of land a mile away and north of the lake, though it is in the same great lot. This language is very significant in connection with the undisputed fact that there are 67 acres of dry land southerly of Fish lake, on lot 3, embraced within the deeds in defendant's chain of title. When a general description in a deed,

contract or statute is inconsistent with a particular description, the particular description prevails. 73 N. Y., 621; 14 Pick., 128; 15 id., 428; 6 Exch., 407; 26 Beav., 533; id., 606; 3 Washb. on R. P., 400; Leake Cont., 228; 1 Chitty Cont. (11 Am. Ed.), 120; Sedg. on Stat. & Const. Law, 360. It cannot be said as matter of law that the deeds in defendant's chain of title embrace the land in dispute. Unaided by oral evidence, it must be held as matter of law that they do not embrace the land in dispute.

The evidence of adverse possession, given in behalf of defendant, is utterly insufficient to justify the ruling that, as a matter of law, defendant Dexter and her grantors had occupied the *locus in quo* adversely for twenty years.

It is not entirely clear whether the words, "commonly called the Fish lake lot," relate to great lot 3 or to the 67 acres of land in that lot and south of the lake. This language appeals to the common understanding for the meaning of the term "Fish lake lot," and it was competent to show that the 67 acre piece was commonly called "Fish lake lot." When an uncertainty arises, not from the terms used, but as to the subject to which they are applied, oral evidence is admissible to identify the subject. A name identifies nothing unless the thing to which it is applied is ascertained. Perhaps the general question, whether the 67 acre lot was commonly called, etc., may be too broad, but it may be shown what it was called, by whom it was so called, and on

what occasions it was so called, so as to enable the jury to say what land the term "Fish lake lot" in the several grants in defendant's chain of title refers to.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.* concur.

#### LIBEL. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Bruce J. Kimball, *applt.*, v. The Herald Co., *respt.*

Decided Jan., 1885.

In an action for libel in publishing plaintiff as a swindler in having obtained credit by false representations, where the truth of the statement is pleaded in justification and mitigation, evidence that defendant's general agent, to whom the representations were made, communicated them to defendant and that it relied upon them, is competent in mitigation of damages.

Appeal from judgment entered on verdict of a jury for defendant, and from order denying motion for a new trial on the minutes.

Action for libel. The complaint alleged that defendant published, in its daily newspaper, Sept. 13, 1880, the following article: "Mr. Kimball owes The Herald Company a debt contracted in the course of his business relations with us which he refuses to pay. His account was permitted to run on because he grossly misrepresented his pecuniary circumstances to us. When we discovered the trick we resolved to nip his swindling operations in the bud, and took steps which will enable us to show publicly in court what manner of man he is."

Defendant pleaded the truth of the publication in justification and also in mitigation.

One S. was general agent of defendant for the distribution of its newspapers in a certain district, and appointed plaintiff a local agent for that purpose at Fulton and its vicinity. He testified that plaintiff, at the time he was appointed, represented that he was the owner of a house and lot. This fact, if so stated, is conceded to be untrue. Defendant was permitted, under objection, to show that this representation was reported by S. to defendant's president and general manager.

*S. N. Dada*, for *applt.*

*E. Nottingham*, for *respt.*

*Held*, No error. Whether the information was true or false it was competent evidence in mitigation of damages if defendant relied upon it in making the publication. 81 N. Y., 246; 7 Robt., 319; 34 How., 488.

J., defendant's president, was permitted to testify that S. reported to him the representations made by Kimball, and that he relied upon the representations.

*Held*, Competent. 81 N. Y., 246.

*Also held*, That the verdict cannot be disturbed on the ground that it is contrary to the evidence. The evidence of plaintiff and of S., as to whether plaintiff made representations as to his property, is directly in conflict, and it was the duty of the jury to decide as between them. If plaintiff represented that he owned the house and lot it was untrue, as he con-

cedes. He also concedes that at the time of the publication he was indebted to defendant for newspapers.

The jury having found that plaintiff had no cause of action, it is unnecessary to determine whether the charge as to exemplary damages was correct or incorrect.

Judgment and order affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

### FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Eliza B. Anderson, respt., v. The Continental Ins. Co., applt.*

Decided Jan. 9, 1885.

A policy of fire insurance was issued by defendant upon property owned by plaintiff, and was sent by defendant to the hotel at which she had been staying for the purpose of being delivered to her. She had left said hotel, and the policy was sent to the person through whom she had made application for it, but it was returned by him with the statement that plaintiff had left the city and he had no knowledge of her wishes in reference to it. Defendant then charged the premiums to plaintiff on its books and sent bills for the same to two places where it was supposed plaintiff might be found, stating that the policy was held subject to her order, but these bills were not received by her. Plaintiff returned to the city during the period named as the life-time of the policy, but made no efforts to pay the premium. In the meantime defendant had procured reinsurance upon the policy, but, the premium not being paid, it cancelled such reinsurance and stamped the policy as cancelled, without, however, notifying plaintiff. The property was subsequently destroyed by fire during the

period named as its life-time. *Held* That such policy was a valid and subsisting insurance at that time, notwithstanding a clause contained therein, that the company should not be liable upon the policy until the premium should be actually paid.

A clause contained in a policy of fire insurance declaring that the agent of the company has no authority to waive, modify, or strike from the policy any of its printed conditions, applies only to agencies of the company maintained separately and distinctly from the office of the company itself, and not to the officers and immediate employees of the company.

A policy which has become a valid and subsisting contract cannot be cancelled without notice to the person for whose benefit it is issued.

The fact that an insurance company has obtained reinsurance upon a policy issued by it, and that entries have been made in its books charging the premium to the insured, may be considered in determining the understanding of the company as to the effect and validity of the policy.

Appeal from judgment recovered on the verdict of a jury, and from an order denying a motion for a new trial.

A policy of fire insurance was issued by defendant upon property owned by plaintiff. This policy was sent by defendant to the hotel in New York city where plaintiff had been staying for delivery to her, but she had left said hotel. The policy was then sent to one M., through whom plaintiff had applied for said policy, and was left at his address. M. returned said policy to defendant with a letter stating that plaintiff had left the city, and he was not advised as to her wishes in respect to said policy.

Defendant then charged plaintiff with the premium upon its books and sent bills for the same to two places where it was thought she

might be reached, stating that the policy was held subject to her order. These bills were not received by plaintiff. She subsequently, during the period designated as the life-time of said policy, returned to the city, but failed to pay the premium upon the policy. In the meantime defendant had procured reinsurance upon the policy, but, the premium not being paid, it had such reinsurance cancelled and stamped the policy as cancelled, but without notifying plaintiff. Subsequently, but during the time named as the life-time of the policy, the property insured was destroyed by fire, and plaintiff then brought this action upon the policy to recover the value of such property. The policy contained the statement or condition that the company should not be liable upon it until the premium therefor should be actually paid, and this action was resisted chiefly on account of the omission of plaintiff to receive the policy and pay the premium.

*Wm. Allen Butler and Thos. H. Hubbard*, for applt.

*Benjamin H. Bristow and Edward Mitchell*, for respt.

*Held*, That the facts showed that there was a delivery of the policy by defendant to M., then plaintiff's agent, with the intention that it should take effect as an insurance of her property, and that a credit was given for the premium, thereby waiving the condition requiring its actual payment for the validity of the policy. 7 Hun, 74, 77; 66 N. Y., 613.

It was objected that such an effect could not be ascribed to the

facts made to appear, because the policy further declared, "That the agent of this company has no authority to waive, modify, or strike from this policy any of the printed conditions."

*Held*, That this provision was not framed in such language as to be rendered applicable to the company and its officers, but was wholly restricted to the business intended to be carried on and transacted by insurance agents maintaining a separate business of their own; and, since this policy emanated directly from the company itself it was within the authority of the persons having the business of the company in charge, under the immediate control and supervision of its officers, to give credit for the premium and waive the provision in question. That that gave it the character of a valid and subsisting contract between defendant and plaintiff, and the insurance could not be cancelled without notice to the insured, and, as no such notice was given, the formal cancellation of the policy was of no effect. 109 U. S., 278.

The court was requested to charge that taking reinsurance was no evidence of an intent on the part of defendant to excuse the payment of the premium, and that entries by defendant in its books not brought to plaintiff's notice were not evidence of defendant's intent toward plaintiff.

These requests were both declined.

*Held*, No error. That the court had already properly charged that, while the taking of reinsurance



created no liability on the part of defendant to plaintiff, it was a fact which the jury could take into consideration, and that the entry in the books, whereby the premium was charged to plaintiff, was a circumstance indicating the understanding of defendant to be that the policy had become effectual, and that the plaintiff thereby had incurred an indebtedness to the company for the payment of the premium.

Judgment and order affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurred.

*Davis, P. J.*, dissented, holding that the facts did not amount to a delivery of the policy, and an establishment of an indebtedness on the part of plaintiff to the company for the premium which the latter could have enforced by suit against her, inasmuch as the policy was never actually accepted either by plaintiff or her agent.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Bolton Hall et al, *respts.*, v. U. S. Reflector Co., *applt.*

Decided Jan. 9, 1885.

When upon the trial of an action before a referee a report made by him in the trial of a previous action between the same parties is admitted in evidence without objection, the referee, in deciding the case, cannot disregard such report as evidence on account of the fact that subsequent to the submission of the case to him, but previous to his decision of it, the judgment entered upon such report has been reversed upon appeal, because there is no evidence of such reversal before him.

The production upon the argument of an appeal of the judgment roll showing the reversal of the judgment entered upon such report will not correct the error of the referee in disregarding such report without evidence of said reversal.

Appeal from a judgment recovered on the report of a referee.

This action was brought to recover the sum of \$3,000 as the amount of commissions plaintiffs were entitled to under an agreement made with defendant upon orders received by it in the course of its business upon which plaintiffs had advanced money.

The defense was that the agreement under which the commissions were claimed was made by fraud and collusion on the part of plaintiffs and the directors of defendant, and that the money advanced by plaintiffs should be considered as invested in the business of defendant under a previous agreement between the parties. Another action between the same parties had been tried before the same referee to whom this was referred, the object of which was to recover back the money claimed by plaintiffs to have been advanced by them, and in which the same defense was set up, and was sustained by the referee. The report of the referee in that action was received in evidence without objection in this action, but it was disregarded by the referee in deciding this case, for the reason that, subsequent to the submission of this action to him, but before its decision, the judgment entered upon it had been reversed, and he considered that it had therefore been deprived of its weight as evi-

dence, and he rendered judgment in favor of plaintiffs.

*Edward P. Miller*, for applt.

*Wm. B. Hornblower*, for respts.

*Held*, That the fact of the reversal of the said judgment was in no manner at any time proved in this action, and it was therefore a fact which could not be legally known to the referee in the disposition of this action, and no weight or effect should have been given to that circumstance by him in its determination.

That the production upon the appeal of the judgment roll showing the reversal of said judgment did not correct the error of the referee in disregarding the report, for while it has been the practice of the Court to receive upon the hearing of an appeal corrected record evidence to supply defects in proof given of the same facts upon the trial, this rule does not permit independent and additional evidence to be given. That its object is to afford an opportunity to correct informalities in record evidence received during the progress of a trial, and to permit such evidence to be produced for the first time upon appeal. 40 Barb., 449; 45 N. Y., 160; 70 N. Y., 613. That other proof of the defense might have been given if the referee's report had not been put in and received, and it could not be said that a good defense might not have been established by such other proof.

Judgment reversed and new trial ordered, costs to defendant to abide event.

Opinion by *Daniels, J.*; *Brady, J.*, concurred in result.

*Davis, P. J.*, concurred, with the understanding that no force was to be given to the report of the referee in the former case in the new trial ordered.

### LOTTERY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respts.*, v. Chas. F. Runge et al, *appls.*

Decided Jan. 9, 1885.

Upon the trial of an indictment charging the crime of contriving or assisting in contriving a lottery, the confession of the defendant, consisting of his explanation of the contrivance to a purchaser, is sufficiently corroborated by proof of such purchase and the production of the article purchased to warrant a conviction upon it under § 895, Penal Code.

It is not necessary, in order to warrant a conviction under § 825 of the Penal Code for contriving or assisting in contriving a lottery to prove that any person paid or agreed to pay anything for any chance for which the lottery provides.

Appeal from a conviction in the Court of General Sessions.

The defendants were indicted and convicted of contriving or assisting in contriving a lottery in violation of the provisions of § 325 of the Penal Code.

The evidence for the prosecution consisted of the testimony of a witness who testified that he had purchased of defendants an article which he produced, and which was a box having numbered compartments containing certain articles and pieces of chewing-gum correspondingly numbered, and that, at the time of such purchase,

defendants explained to him how the article was to be used, which was to sell the chewing-gum to children, who should be entitled to the article contained in the compartment having the corresponding number to that upon the piece of chewing-gum purchased.

It was claimed by defendants' counsel that the only evidence of the crime was this confession of defendants, and that they could not be convicted upon it without corroboration. § 395, Code of Crim. Pro. It was also claimed by defendants that there was no evidence of the commission of the crime, because the witness for the prosecution had purchased the box for the purpose of evidence, and no person had ever paid or agreed to pay anything for a chance.

*Wm. F. Howe*, for appls.

*Peter B. Olney*, for respts.

*Held*, That the confession of defendants was sufficiently corroborated to warrant their conviction by the proof of the purchase and the production of the article so purchased.

That it is not necessary, under § 325 of the Penal Code, to show, when a person is indicted for contriving a lottery, that any person paid or agreed to pay anything for any chance for which the lottery provides. That if defendants had been indicted alone for contriving, it might be doubtful whether a conviction could be sustained on the indictment, but they were also indicted for assisting in contriving a lottery, and proof of that fact was furnished by the admission of

defendants that they manufactured and arranged the box with the numbers, which they sold.

Conviction affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

### APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*John Staats, respt.*, v. *Thomas Garrett, applt.*

Decided Nov., 1884.

The respondent served a notice of entry of judgment to limit an appeal in this action. More than sixty days afterwards appellant served by mail notice of appeal to the General Term. After this respondent gave appellant a written extension of time to serve a case, and the latter went on and got ready for argument. Upon a motion to dismiss the appeal because not taken in time, *Held*, that the court would regard the extension of time to serve a case as a waiver of the notice of entry of judgment.

Motion to dismiss an appeal to this court on the ground that the notice of appeal was not served in time. Code, § 1351.

The attorneys live in different places.

*J. H. Clute*, for the motion.

*N. C. Moak*, opposed.

*FISH, J.* A notice of entry of judgment was served by mail more than sixty days before the notice of appeal was served. Appellant claims that the notice of entry of judgment was defective and was not regularly served. Also that, even if the notice of entry was sufficient, after that plaintiff gave defendant a written extension of time to serve a case and exceptions,

under which he went on and got ready for argument. Plaintiff's counsel in the argument admits he he did not understand the time to appeal had expired. It seems that neither party understood that the notice served had limited the time to appeal. Under the circumstances, we will hold that the stipulation by plaintiff extending the time to make and serve a case was in effect a waiver and abandonment of the notice of entry of judgment, or at least a concession that the notice was for some cause ineffectual.

Motion denied.

*Learned, P.J., and Landon, J., concur.*

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Frederick Turner, *applt.*, v. The Chateaugay Ore Co., *respt.*

Decided Dec., 1884.

M. was foreman of a pit in defendant's mine, and as such had power to hire and discharge men in that pit. A hole in the pit had been charged with rendrock and powder and fired, and upon examination it was supposed that the charge had exploded. M. ordered plaintiff to drill the hole deeper, in doing which the charge exploded and plaintiff was injured. M. was not shown incompetent, and plaintiff was a skilled workman. *Held*, that plaintiff could not recover; the business was a dangerous one, and plaintiff took the risks of the employment; the negligence, if any, of M. was that of a co-servant.

The action was for negligence. In addition to the facts stated above it appeared that rendrock was an explosive more powerful than pow-

der, and likely to explode by concussion. It was shown that it was M.'s duty to examine a hole which had missed fire and clean out the explosives. M. alone charged the holes. When rendrock and powder were both used in one hole the rendrock was placed at the bottom and the concussion caused by the explosion of the powder was relied on to explode the rendrock. Sometimes this did not occur. And the evidence showed that this accident probably happened in that way; M. being led by the explosion of the powder to think that the rendrock had also exploded, which was not the fact. On the day of the accident nine holes were exploded at once, and after a time M. ordered the miners to return to the pit. He ordered plaintiff to drill deeper a hole which had "blown out;" after a few blows struck by plaintiff there was an explosion by which he was injured.

Plaintiff was non-suited.

*Geo. W. Miller*, for *applt.*

*M. D. Grover*, for *respt.*

*Held*, That the ruling was proper. Plaintiff was a skilled miner, familiar with such explosives, and knew that such accidents as this, where the charge fails to act, might occur. M. was also a servant of defendant, and no attempt was made to show that he was not a competent foreman, nor that the tools or materials furnished by defendant were defective; nor that any duty was omitted which defendant owed plaintiff as an employee in this business. Hence there can be no recovery. '49 N. Y., 521; 133 Mass., 501; 81 N. Y.,

516 ; 84 id., 77 ; 70 id., 171 ; 88 id., 266 ; 29 Hun. 556.

Judgment affirmed.

Opinion by *Fish, J.* ; *Learned, P.J.*, and *Landon, J.*, concur.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Rhoda Lawrence, *respt.*, v. The Delaware & Hudson Canal Co., *applt.*

Decided Jan., 1885.

Plaintiff, an aged lady, left the train at the wrong station ; the station-master stopped the train, and the conductor called out to her to come on. She did so, and fell into a cattle guard, which was on the other side of the station from the highway, and was injured. *Held*, That under these circumstances the referee was justified in finding for plaintiff.

Appeal from judgment in favor of plaintiff, entered on report of a referee.

Action to recover for injuries caused, as alleged, by defendant's negligence.

Defendant's trains ran north and south, the highway at the station at M. ran east and west. This highway was the only road leading to the station. Forty-three feet north of the highway was the south end of the station building. This building was twenty-eight feet long. Directly opposite its northern end was an open culvert, six feet wide, which served to conduct a small stream under the track, and also acted as a cattle guard. Plaintiff, at 8.40 p.m. in October, got off a train at M. by mistake, thinking she had arrived

at her own station, G. Discovering her mistake, the station-master said he would stop the train, then in motion, and let her go with it to G. The train stopped a little north of the culvert and about twenty feet north of where plaintiff got off. The conductor called out to her, "Come this way, lady." Plaintiff, who was fifty-eight years old, hurried on, fell into the culvert, and was seriously injured. There was an oil lamp in the window of the station building which threw light on the culvert—it was distant from the culvert some fifteen feet.

The referee found that defendant was guilty of negligence in maintaining the culvert in the position stated. He also found that, while plaintiff could have seen the culvert had she been looking at the roadway, yet, under the circumstances, she was not guilty of negligence.

*E. Young*, for *applt.*

*J. F. Crawford*, for *respt.*

*Held*, That the questions in the case were for a jury or referee, and that the evidence of plaintiff's negligence was not indisputable.

As to the culvert, defendant is authorized by Ch. 282, Laws of 1854, to maintain cattle guards at all road crossings. This culvert, which is called a cattle-guard, was, as appears, seventy-two feet north of the R.R. crossing. There was nothing to prevent defendant from placing the guard at the crossing. It chose to put it just opposite the north end of the station. It was, we think, a proper question for the referee whether the placing of this

open culvert, six feet in the clear, near a station, and where it was not necessary to place it, was or was not negligence. 40 N. Y., 146.

We also think the circumstances show that plaintiff might have inferred that she was to go to the train. Her ticket had been taken up. She got out, then the station-master informed her that she had made a mistake, and that he would stop the train. When the train stopped it was north of the culvert, placing the culvert between the train and plaintiff. We think the conductor was mistaken in his testimony that when he said, "Come this way, lady," the center of the rear car, on the rear platform of which he stood, was over the culvert. The train was in motion, and if stopped when it had gone only thirty-three feet, the rear platform of the rear car would have been north of the culvert. Plaintiff fell through the culvert, and had not reached that platform. And it is absurd to suppose that she would continue to walk beyond that platform after she had reached it. The train did not back down towards plaintiff, and she had not been told that it would back down. The distance north which plaintiff went was only twenty feet, and the rear platform was not many feet away when she fell. We think she might have considered it her duty and that she was invited to go on to the point where the train stood.

As to plaintiff's negligence, there were lights in the cars and in the station. These lighted up the place of the accident. But plain-

tiff's attention was fixed, and properly, upon the cars. They were waiting for her. It was her duty, as she evidently thought, to go to them. She had a right to suppose that access to them was safe. She had no reason to suppose that a culvert six feet wide (or eleven feet at the top) was in the way. Nor could she suppose that so dangerous a place would be constructed opposite a station. The question of her negligence was for the referee, and we cannot say his decision was improper.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *London J.*, concurs; *Fish, J.*, dissents.

## CREDITOR'S ACTION.

### TRUSTS.

#### N. Y. COURT OF APPEALS.

*Niver, resp't., v. Crane et al., applts.*

Decided Jan. 20, 1885.

A creditor's action, whether instituted under the provision of the Rev. Stats. or the Code Civ. Pro., can reach only property belonging to or things in action due to the judgment debtor or held in trust for him.

To make out a trust under 1 R. S., 728, § 52 the money must be paid at or before the execution of the conveyance.

In an action to reach land held by a judgment debtor's wife on the ground that it had been bought and paid for by him and that the transfer to her was made for the purpose of defrauding creditors, it appeared that the wife paid for it by transferring certain property of her own, assuming a mortgage thereon and giving her note for the balance. *Held*, that the debtor had neither title to nor any legal interest in such property.

This action was brought by

plaintiff, a judgment creditor of the defendant M. C., against him and his wife, seeking to charge certain lands with the judgment debt, on the ground that they were bought and paid for by the judgment debtor and are held in the name of his wife in order to defraud his creditors. It appeared that the property which is alone in question was paid for by the wife of the judgment debtor and no part of it by her husband, she conveying to the grantor certain property of which she had the legal title and assuming and agreeing to pay \$4,500 of existing mortgages and giving her own note for \$400. It also appeared that the property she conveyed to said grantor she had purchased under the following circumstances; she first took a contract in writing under which she agreed to pay the purchase money and by which the then owners agreed to convey the property to her. Her husband was not named. Upon the execution of that contract she paid \$1,000, made up from \$183.00 which she then had of her own, and \$817.00 which she borrowed from her father-in-law on her own note. When the deed was given she assumed payment of the existing mortgage and executed another on the premises for the unpaid purchase money.

*M. M. Waters*, for applts.

*A. P. Smith*, for resp't.

*Held*, That plaintiff was not entitled to the relief sought. 15 N. Y., 475; 32 id., 53; 48 id., 218. A judgment creditor's action, whether instituted under the provision of

the Revised Statutes (2 R. S., Tit. 2, pt 3, Ch. 1, Art. 2), or the Code Civil Procedure (Tit. 4, Art. 1, Chap. 15), can reach only property belonging to or things in action due to the judgment debtor or held in trust for him.

*Also held*, That as between the judgment creditor and the judgment debtor it was immaterial whether the latter paid the consideration for property conveyed at his instance to his wife. He had neither title to nor any legal or equitable interest in such property. 1 R. S., 728, §51. To make out a trust under the provision of the Revised Statutes, 1 R. S., 728, §52, that where the consideration of a grant for a valuable consideration to one person is paid for by another such conveyance shall be deemed fraudulent as against the creditors at the time of the person paying the consideration, and if a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands, the money must be paid at or before the execution of the conveyance. 6 Cow., 105; 2 Johns. Ch., 405; 5 id., 1; 6 Johns., 197; 3 Paige, 391; 10 id., 249. The foundation of a trust of this nature is the payment of the money by the *cestui que trust*.

*Wood v. Robinson*, 25 N. Y., 564; *McCartney v. Bostwick*, 32 id., 53; *Baker v. Bliss*, 39 id., 70; *Ocean Nat. Bank v. Olcott*, 46 id., 12, distinguished.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Danforth, J.* All concur.

### EVIDENCE. DEEDS.

N. Y. COURT OF APPEALS.

*Hutchins, applt., v. Hutchins, respt.*

Decided Jan. 20, 1885.

It is only where the party making the declarations has, at the time of making them, title to the property that such declarations bind his successor in interest. A declaration to a stranger is mere hearsay. A reservation by parol of a life estate to the grantor in case of a deed in fee cannot be sustained.

*Semble*, That a deed cannot be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention that the grantee should acquire no rights whatever under it, or that he should re-convey to the grantor on request without any consideration.

Reversing S. C., 15 W. Dig., 370.

This was an action of ejectment to recover possession of certain lands conveyed by defendant by warranty deed, in fee, to P. H., plaintiff's husband, and which were devised by him to plaintiff in fee. Defendant's answer set up that the deed from defendant to P. H., of the lands in question was a mortgage in trust and that it was expressly agreed that P. H. should never ask that said deed or mortgage be paid, but that he should release, discharge or deed back said land at any time defendant so elected, and judgment that the instrument should be discharged of record was demanded. Plaintiff introduced in evidence a warranty deed of the premises to defendant, dated April 1, 1879; a warranty deed from defendant to P. H., dated

March 11, 1880, consideration \$1,391, duly acknowledged and recorded as a deed of real estate, and containing no exception, reservation or defeasance. She then proved the death of P. H., June 11, 1880, and introduced in evidence his will, which was admitted to probate Oct. 12, 1880, and devised the premises in question to plaintiff in fee, and proved a demand by her for possession of the premises served Nov. 3, 1880. It was also proved that P. H., paid \$1,391 for the premises and that they were worth from \$1,200 to \$1,500; that defendant's grantor had a mortgage of \$900 on the land given by defendant, which P. H. paid and had discharged nearly a month after he received his deed from defendant. Oral evidence was admitted, under exception, of declarations of P. H., to third persons, as to his motives in acquiring title to the premises, to the effect that he intended to assist defendant, who was his brother, in paying for the place, to make him a home as long as he lived. Defendant was not present at these conversations. These declarations were made before P. H. acquired title.

*R. H. Duell*, for applt.

*A. P. Smith*, for respt.

*Held*, That evidence of declarations made by P. H., before he acquired title to the premises in question, as to his intentions and motives in regard to the premises, was inadmissible as against plaintiff. It is only where the party making the declarations has, at the time of making them, title to the



property that such declarations bind his successor in interest. A declaration to a stranger is mere hearsay.

Defendant was allowed to prove under objection that P. H. was supposed to be worth \$15,000, while he swore that he was not a man of property.

*Held*, Error; that this evidence was irrelevant and improper and cannot be said to have been harmless. 54 N. Y., 334.

The judge, after charging that the only question for the jury to decide was whether the deed from defendant to P. H. was what it purported to be or was intended as a mortgage, was requested by defendant's counsel to charge as a further and independent proposition, that if P. H. promised that defendant should have possession of the property during defendant's life, in consideration of a conveyance of the premises by defendant, and defendant has kept possession under that agreement from that time to this and paid the taxes and made valuable improvements on it, on the strength of it, then he is entitled to possession during his life, and this action cannot be maintained. The charge was made as requested and an exception was taken.

*Held*, That the charge was erroneous. A reservation by parol of a life estate to the grantor in case of a deed in fee cannot be sustained.

It seems that a deed cannot be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the

intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor on his request without any consideration.

Judgment of General Term, affirming judgment on verdict for defendant, reversed, and new trial ordered.

Opinion by *Rapallo, J.* All concur.

## SECURITY ON ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William T. Riggs, *applt.*, v. The Cleveland, Youngstown & Pittsburgh RR. Co., *respt.*

Decided Jan. 9, 1885.

It is doubtful whether an order increasing the security required upon an attachment is appealable to the General Term.

The amount of security required upon an attachment is in the discretion of the Court or Judge, and an order fixing it will not be interfered with upon appeal, unless such discretion has been abused.

It is not an abuse of such discretion to require an undertaking in the sum of \$5,000 upon an attachment of certain bonds of a foreign corporation in which defendant's interest, assuming them to be of par value, is \$168,568.60 although their real value is uncertain and is probably much less than par.

The appointment of a foreign receiver of the corporation issuing the bonds on the ground of its insolvency is no reason for vacating an order previously made, fixing such security.

Appeal from order granting motion to increase the security required on issuing an attachment, and from an order denying motion to vacate the order increasing such security.

Plaintiff brought this action to recover damages alleged to be \$550,000 for breach of contract, and defendant being a foreign corporation he sued out an attachment, giving an undertaking of \$500, and the attachment was levied upon defendant's interest in \$410,000 of bonds deposited as collateral for loans. The value of defendant's interest in the bonds, assuming them to be worth par, over and above the indebtedness for which they were pledged, was \$163,568.60, and, although the real value of the bonds was uncertain and was probably much less than par, the security required upon the attachment was increased upon motion of defendant to \$5,000. Plaintiff subsequently moved to vacate the order requiring this increased security on the ground that a foreign receiver of defendant had been appointed on account of its insolvency. The Court denied this motion upon the ground that this additional fact did not necessarily affect the value of the bonds.

*G. C. Lay*, for applt.

*J. M. Ferguson*, for respt.

*Held*, That it might well be doubted whether the orders in the case were appealable. That the amount of the undertaking in such cases is in the discretion of the Court or Judge, and, unless that discretion has been abused, there seems to be no good ground for holding that an appeal from such an order can be taken to this Court. 57 How., 170; 15 Abb., 29; 24 How., 425. That, assuming that the orders were appealable, there was

no sufficient reason for interfering with the discretion exercised by the Court at Special Term in fixing the amount of the undertaking required at \$5,000.

That the reasons assigned by the Special Term for denying the motion to vacate the order directing the increased security were satisfactory and his conclusion should not be interfered with.

Orders affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniel, JJ.*, concur in the result.

#### EXTRA ALLOWANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Timothy W. Gooding, *applt.*, v. Spencer A. Brown et al., *respts.*

Decided Jan. 1885.

Until the contrary is shown, it will be presumed that an order of Special Term allowing additional costs was rightfully granted. Although the record and papers before the appellate court do not show that the case was difficult and extraordinary the case is not necessarily excluded from the operation of the statute giving additional allowance.

Appeal from Special Term order giving defendants additional allowance of \$500.

The trial in this cause, in which the order appealed from was entered, did not occupy more than a day. No testimony was given on defendants' part. The facts were few and simple. They showed an executory oral agreement that two persons should make their wills for the benefit of the survivor. The determination of the case required the application of only well

settled principles of law to the facts, and about the facts there was no dispute on the trial. The controversy involved about \$100,000. The judge who heard and decided the case held the court which made the order. It seems that the motion was made on papers and statements, some of which do not appear on this appeal.

*J. Henry Metcalf and W. F. Cogswell*, for applt.

*E. M. Morse and E. G. Lapham*, for respts.

*Held*, That the expression "difficult and extraordinary" in the statute allowing additional allowance, Code Civ. Proc., §3253, imports something more and other than usual, common, and ordinary in respect to the labor and skill required, or in the time occupied in the preparation or trial of the case or both. 5 How., 278; 22 id., 454; 24 id., 385; 7 Hun, 184. The decisions give no well defined interpretation and application of the rule. See 14 Hun, 110; 61 N. Y., 564; 17 Hun, 87; 16 Abb., 465.

So far as relates to the questions of law presented and the time occupied in the trial it does not seem that the case comes within the fair meaning of the terms difficult and extraordinary.

It is not shown that the judge who granted the order had not knowledge of facts which do not appear here. We cannot say there was an abuse of discretion. 8 W. Dig., 57; 9 id., 286; 31 Hun, 403; 29 N. Y., 426; 63 Barb., 555.

Order affirmed.

Opinion by *Bradley, J.*; *Haight, Angle and Childs, JJ.*, concur.

### LIMITATIONS.

Code Civ. Pro., § 383.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Rodney C. Webber, *applt.*, v. The Herkimer and Mohawk Street R. R. Co., *respt.*

Decided Jan., 1885.

The contract of a carrier to carry a passenger is an important element in the passenger's right to recover for a personal injury caused by the carrier's negligence, but only as inducement and not as substance. The real ground of action is the tort or negligent act of the carrier, whereby the passenger is injured; and such action must be brought within three years

Appeal from judgment dismissing complaint and sustaining the defense of the statute of limitations, and from order demurring motion for a new trial on the minutes.

Plaintiff brought this action to recover damages for an alleged breach of an agreement between the parties whereby defendant contracted to carry plaintiff from Herkimer to Mohawk. The gist of the action is the injury to the person of plaintiff by reason of the unfitness of the car used and the dangerous proximity of telegraph poles to defendant's truck whereby, or by reason whereof, plaintiff was struck and injured by a telegraph pole while on the car. The cause of action occurred June 23, 1879, and the action was commenced in March, 1883, more than three years thereafter.

The defence interposed was the

three years statute of limitations, as prescribed by sub-division 5 of § 383, code civ. pro.

*A. B. Steele*, for applt.

*S. Earl*, for respt.

*Held*, No error. Without such contract the person complaining may have been a trespasser or wrongfully upon defendant's car. Hence the contract is an important element in the right to recover, but only as inducement and not as substance. The real ground of action is the tort or wrongful act of defendant whereby plaintiff is injured while rightfully there, and in default of the duty owing by defendant to plaintiff and every passenger. A breach of this contract to carry might have occurred for which a limitation of the right of action is prescribed by § 382, such as a refusal to carry the whole distance or a refusal to carry within a reasonable time. Those are not *personal* injuries, and would not be controlled by § 383. This must be deemed an action for negligence pure and simple, and under § 383 code civ. pro. must be brought within three years. 48 N. Y. Ct. Rep. 44 affirmed in 93 N. Y. 522, applies, whether the form of action was, as in this case, for a breach of the contract, or simply for the negligence in the discharge of a duty owing to plaintiff, whereby he suffered personal injuries. In either case the injuries were personal and wholly due to the negligence of defendant.

Judgment and order affirmed, with costs.

Opinion by *Boardman, J.* ; *Hardin, P. J.*, and *Follett, J.*, concur.

## CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

John F. Holcombe, *respt.*, v. Kneeland J. Munson et al., *applts.*

Decided Jan., 1885.

In March H. entered into a written contract with M. & L., to cut the timber on certain lands, turn it into coal and deliver it at a certain railroad to cars to be furnished by M. & L. In April L. sold out his interest to another. In May M. said to H. that they would not carry out the contract, and would take the consequences. In an action by the assignee of H. upon the ground that H. had been prevented from performing. *Held*, that as no tender was shown there could be no recovery; that L. was not bound by the statements of M. made after L. had sold out his interest in the contract.

A verbal addition to a written contract which fixed the amount of goods to be delivered thereunder, said amount being over fifty dollars in value, no part thereof having been delivered and nothing having been paid thereon, is void and there can be no recovery upon the verbal agreement.

In March 1880, one George P. Holcombe, plaintiff's assignor, entered into a written agreement with defendant Munson, and the other defendant, Landon, by which he agreed to take charge of and cut, coal and deliver all the timber on certain lots of land belonging to defendants, the charcoal to be delivered at a railroad to cars to be furnished by defendants; for this Geo. P. Holcombe was to receive certain sums per bushel. Under this clause the first cause of action was laid. The agreement then went on to provide that defendants would pay Geo. P. Holcombe twelve dollars per hundred bushels for good, merchantable

charcoal made from hard wood to be purchased by Holcombe, the same to be delivered on the cars and paid for on the 15th of each month. Under this clause the second cause of action was laid. The breach alleged under the first cause of action was that defendants prevented and discharged said Holcombe from supplying them with coal as aforesaid and from further executing said contract. Plaintiff was also allowed to prove under objection that defendant Landon had agreed by parol with Geo. P. Holcombe after the signing of the contract, that the latter should deliver 100,000 bushels of coal during 1880 under the second clause of the contract. Under both clauses the referee allowed a total recovery of \$14,000, although he did not specify how much damages he gave under each separately.

*E. Cowen*, for applt.

*J. Lansing*, for respt.

*Held*, Error. The defendant Landon sold out his interest in the firm of Munson & Landon to the Portchester Iron Co. on April 3, 1880. The finding of the referee that defendant prevented Geo. P. Holcombe from executing the contract is based upon an interview had on May 13, 1880, between Geo. P. Holcombe and Munson, Landon not being present, in which Munson said that they could not carry out the contract as agreed; that the price was too low and that he would ignore the contract and take the consequences. This interview is denied by Munson, but if true it does not support the

finding. All it would amount to is that if defendants had sued plaintiff for non-performance the latter might have pleaded that his non-performance was assented to by defendants. Damages could only be recovered by plaintiff by a tender of performance on his part or because a tender of performance was prevented by some act of defendants. As against Landon the interview was of no weight. What Munson said about the contract after Landon had sold out would not bind the latter. Of course by selling out Landon was not excused from the contract and a tender to Munson would have been good as to Landon, and Munson's refusal to accept would have been the refusal of both. But there was no tender: and Landon testified he was always ready and willing to perform. It was also error to allow parol evidence of the number of bushels of coal to be furnished under the second cause of action. The damages allowed under this head, as near as we can estimate, are \$2,000. Such an addition to a written contract should be in writing and signed by the parties. It was for the purchase of \$12,000 worth of charcoal of which no part was delivered and on which nothing was paid.

Judgment reversed, new trial granted, referee discharged, costs to abide event.

Opinion by *Fish, J.*; *Learned, P.J.*, concurs; *Landon, J.*, not acting.

## PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Margaretta Pfeffele, admrx.,  
*respt.*, v. The 2d Ave. RR. Co.,  
*applt.*

Decided Jan. 9, 1885.

The Court, upon the trial of an action before a jury, has no right to refuse to accept a request to charge made after the conclusion of its charge to the jury upon the ground that counsel had already, before the commencement of the charge, presented such requests, and a refusal to accept such request is a fatal error.

Appeal from judgment entered on verdict in favor of plaintiff.

This action was brought to recover damages for the death of plaintiff's husband, which was caused by a collision between a truck driven by him and one of defendant's cars, and which collision, it was alleged, was caused by the negligence of defendant's servant. This collision occurred while defendant's car was descending a grade and was beyond the control of the driver, the front connection rod having been broken. Plaintiff claimed that there was evidence showing that the connection rod broke before the car reached the top of the hill and began to descend the grade, and after the judge had charged the jury, but before they had retired, and immediately upon his concluding the charge, defendant's counsel requested him to charge the jury that if they believed the connection rod broke at the top of the hill defendant was entitled to a verdict. To which the Court responded, "I have charged your re-

quest in that respect." The counsel then said, "I ask your Honor to charge it in that language." To which the Court said, "I will not accept any request now, the counsel having already presented his requests to charge." Whereupon counsel for defendant excepted to the refusal of the Court to charge and to its refusal to accept any request.

*Austen G. Fox*, for *applt.*

*Samuel Untermeyer*, for *respt.*

*Held*, Error: That the refusal to accept a request to charge is a fatal error in the conduct of a trial. 86 N. Y., 479. That, in principle, it makes no difference whether the requests to charge are presented before or after the charge is delivered. 88 N. Y., 671. That emergencies may arise making it necessary to make further requests after the conclusion of the charge, and it is not only the right, but the duty of counsel to make such requests in the discharge of his professional obligations, not only to his client, but to the court, as the emergency demands.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurs. *Davis, P.J.*, dissents upon the ground that the Judge had already charged upon the request presented, and that it was no error to refuse to charge in its exact language, and that the exception to the remark of the Court that it would receive no further requests raised no material question, because no further requests were offered and that to make such a refusal a ground of error it

must appear that farther requests were presented, what they were, that they were material, etc.

### PARTNERSHIP EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Loren W. Marsh, *applt.*, v. Sylvester P. Pierce, *respt.*

Decided Jan., 1885.

In an equity action a new trial will not be granted for errors in the admission or exclusion of evidence if the case has been rightly decided upon sufficient and competent evidence.

In an action for a partnership accounting where such co-partnership is denied, oral evidence is admissible to show that the articles of copartnership were not intended to operate as a contract between the parties, but were made for the purpose of defrauding plaintiff's creditors.

Appeal from judgment, dismissing complaint, entered on the report of a referee.

Action for a partnership accounting. Jan. 12, 1872, plaintiff owned a stock of drugs and was engaged in business as a druggist. On that day the parties hereto signed a writing which purported to form an equal copartnership between them in that business to take effect as of Jan. 1, 1872. Jan. 21, 1878, the stock was sold out and the business discontinued.

This action was brought in April, 1879, the complaint alleging that by virtue of the writing the parties became equal copartners Jan. 1, 1872, and continued in business as such until Jan. 21, 1878. The answer denied that a copartnership ever existed between the parties.

On the trial defendant was al-

lowed, under objection, to show by parol evidence that the parties did not intend that the writing should take effect as an agreement, but was signed to hinder a judgment creditor of plaintiff from enforcing his judgment and that, in fact, the parties never engaged in business under the writing.

The referee found that the writing was signed to create an apparent partnership for the purpose of preventing a creditor of plaintiff from collecting a judgment about to be recovered, and ordered the judgment appealed from.

On this appeal the following stipulation was made: "Plaintiff concedes and admits on the argument of the appeal in this action, that there is sufficient evidence to sustain the referee's findings of fact, and the referee's findings of fact are not against evidence or the weight of evidence."

*C. E. Stephens*, for *applt.*

*F. A. Lyman*, for *respt.*

*Held*, If the language of this stipulation is to be understood in its usual and legal signification, there is nothing to be determined on this appeal; because, if there was sufficient evidence to sustain the findings of fact the conclusion of law necessarily follows, and that is an end of the case. In an equity action a new trial will not be granted for errors in the admission or exclusion of testimony if the case has been rightly decided upon sufficient and competent evidence. Code Civ. Pro., § 1003. But assuming that plaintiff intended to stipulate that if the testimony received over his objection was legal

evidence, it was sufficient to sustain the findings of the referee, then the exceptions become available on this appeal.

When the existence of a written contract is asserted and denied, an issue of fact is formed which must be determined by oral evidence, except when different evidence is authorized by statute. Upon this issue it may be shown by oral evidence that a writing, in form a perfect contract, was not intended by the parties to be, or operate as such, or that it does not express a contract entered into between the parties. 60 N. Y., 394; 2 H. & C., 277; 11 C. B., N. S., 369; 6 E. & B., 370; 33 L. T., 672; 24 W. R., 159; 2 B. & C., 82; 1 Keyes, 532; 32 N. J. Eq., 233-826; 40 Mich., 84; 32 Md., 136; Whart. Ev., § 927; 1 Chitty Cont. (11 Am. Ed.), 159; Leake Cont., 186. This is not in conflict with the rule that a written contract cannot be varied by oral evidence.

That plaintiff's admissions, made subsequent to the date of the writing, that the parties were not co-partners, were competent. 8 R. I., 389; 1 Greenl. Ev., § 248.

That the writing having been made by plaintiff to defraud his creditors, he is not entitled to the aid of a court of equity to adjust the accounts arising out of the fraudulent scheme. 4 Hill, 424; 15 N. Y., 334; Story Eq. Jur., § 298; Pomeroy Eq. Jur., §§ 401, 940; Snell's Eq., 35. A court of equity will not, as between the parties to a fraud, take an account and divide the fruits of the fraud.

Judgment affirmed, with costs.

Opinion by *Follet, J.; Hardin, P. J., and Boardman, J., concur.*

#### TITLE. COVENANTS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Ann M. Dawley, applt., v. Emily N. Rugg et al., respts.*

Decided Jan., 1885.

A release by a grantee of all rights of action under the covenants of his grantor's deed does not affect the title acquired by the grantee under the deed.

Appeal from judgment on verdict at Circuit and from order denying new trial.

Ejectment. First trial resulted in favor of plaintiff, who went into possession. Defendants took a new trial and secured a verdict. Plaintiff's motion for new trial was denied and judgment was entered on the verdict. Plaintiff appeals. Both plaintiff and defendant Emily claimed title under deeds from one J. R., father of plaintiff and of defendant Emily's husband. After plaintiff took possession under her judgment defendant Emily sued the executors of J. R. on the covenants of quiet enjoyment, etc., in the deed to her. That suit was settled, Emily receiving \$500 and releasing to said executors and all the heirs at law of J. R. all her claims and cause of action on said covenants. On the second trial plaintiff set up the facts of such settlement. The court denied plaintiff's request to hold that the effect of the release made by defendant Emily on such settlement was to defeat her claim of title under the deed to her as an estoppel, or as a



release of her interest in the premises. The verdict is supported by the evidence, unless the release defeated defendant's right to assert title under the deed from J. R.

*W. Woodbury*, for applt.

*W. S. Thrasher*, for respts.

*Held*, That the release and settlement did not affect defendant's title under the deed. It did not in terms release any interest in the premises, and no greater effect can be given to it than its purpose, ascertained by its terms, fairly justifies. The conveyance of title did not depend upon the covenants; they were personal obligations assumed by the grantor, which were valueless if his title was perfect. The legal effect of the release is nothing more than taking the covenant from the deed and leaving defendant to rely solely on her alleged title. The reasons why the executors made the settlement and paid for the release are not important here.

Judgment and order affirmed.

Opinion by *Bradley, J.*; *Angle* and *Childs, JJ.*, concur.

#### PROMISE. PERJURY. MALICIOUS PROSECUTION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Evan Jones*, applt., v. *Henry McCaddin, jr.*, deflt.

Decided Dec., 1884.

A promise not to disclose another's intended bid at an auction confided to the promisor does not create an obligation that the law will enforce, and no action lies for alleged damages due to a violation of such confidence.

A civil action does not lie against one who, while a witness in a civil trial in which the plaintiff was a party, testified falsely. The witness must be left to the criminal law.

While a suit is pending no action in the nature of a suit for maliciously or without probable cause instituting the pending suit can be maintained.

Appeal from judgment on dismissal of complaint.

The complaint alleged that defendant, in violation of his promise to plaintiff, notified John Jones what prices plaintiff was intending to bid on various parcels put up for sale, and in consequence said John Jones underbid plaintiff on two parcels and overbid him on two parcels, to plaintiff's great damage.

It also alleged that defendant falsely testified in an action between Evan Jones and John Jones and caused thereby irreparable injury.

Plaintiff also complained that defendant aided and abetted John Jones in making certain transfers of property and had testified for and co-operated with John Jones in an action brought by plaintiff to set aside the conveyances not yet determined.

*Louis H. Rowan*, for applt.

*Jacob F. Miller*, for respt.

*Held*, That no cause of action is stated in the first paragraph. The promise of defendant not to disclose plaintiff's intended bids does not create an obligation that the law will enforce. Aside from this, it is not plain what advantage John gained nor what injury plaintiff sustained by the disclosure. When the auction took place and the bids were made all the parties present

would know them. We do not see what harm could follow their being known before. Nor can we see what connection would exist between plaintiff's intentions and the bids made by John. Presumably John would bid for each parcel what he considered it worth and no more. He does not seem in any case to have guided his bids by plaintiff's views.

As to the second ground of complaint John Jones and defendant testified to one state of facts and were believed by the Court. Plaintiff testified to a different state of facts, notwithstanding which judgment was obtained against him. Plaintiff's present claim may be true, yet he has no relief by civil action. The witnesses must be left to the criminal law. *Cooley* on Torts, 211.

Respecting the third cause of action it is sufficient to say that while the suit is still pending no action in the nature of a suit for maliciously or without probable cause setting in motion the machinery of the law can be maintained. 11 C. B., 712.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

#### MALICIOUS PROSECUTION. CORPORATIONS.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

James S. Morton, *respt.*, v. The  
Metropolitan Life Ins. Co., *applt.*

Decided Dec., 1884.

A corporation is liable for malicious prosecution.

Where the superintendent of the corporation had prosecuted the action on which this suit was based, evidence that the counsel's bill in that action was paid by the corporation is relevant.

The question as to the advice of counsel is for the jury, as they are to determine in considering the question of probable cause whether such advice was sought in good faith.

In an action for malicious prosecution the Court charged the jury that if they should find that the prosecution of plaintiff was authorized by the corporation and that it had failed, they should then consider the question of probable cause; that upon this branch of the case they were to determine whether the charge of embezzlement was true; if it was, then there was an end of the case and the verdict would be for defendant. If true in part only, then plaintiff was not necessarily to have a verdict; they were then to consider whether defendant had probable cause to believe the charge true, and if it had, then the verdict was to be for defendant. *Held*, No error.

Appeal from judgment on trial at Circuit entered in favor of plaintiff.

Action for malicious prosecution. The essential facts sufficiently appear in the abstract of the opinion.

*Wm. H. Arnoux*, for applt.

*B. F. Watson* and *Hugo Hirsch*, for respt.

*Held*, That a corporation may be held liable in a proper case for malicious prosecution. Although no action of this character against a corporation has been reported in this state, yet elsewhere the Courts have sustained such actions. 9 Phila., 189; 22 Conn., 535; 3 Vroom, 334; 42 Am., 413.

Evidence was offered to show that defendant had paid a counsel's bill for services in the proceeding on which this suit was based, and

in which the superintendent of defendant had been the moving party and had made the affidavit laying the information on which plaintiff herein had been arrested. Such evidence was admitted under exception.

*Held*, No error, inasmuch as it was proper to show whether the arrest and prosecution of plaintiff was the individual act of the superintendent or was the act of the corporation itself. If this were the individual act of the superintendent the company would not have been liable, and it is very doubtful whether any act of the corporation after the termination of the prosecution could so far ratify the superintendent's act as to make the company liable. But if the company had authorized the superintendent to prosecute plaintiff, or after the arrest it became a party to the action or continued or assented to the prosecution, they would be liable.

With reference to the foregoing the court charged, in substance, that if the jury should find that the corporation was connected with the action of its officers by the payment of the expenses incurred in this prosecution, or if it approved of the prosecution and devolved that duty upon its officers, then if the other elements were made out defendant was liable.

*Held*, No error. It is impossible to understand this language as meaning that the company could make itself liable by a ratification subsequent to the termination of the criminal prosecution.

It appeared from plaintiff's testi-

mony that he had informed the superintendent and the president of defendant that the money which it was plain he had embezzled had not been paid by him to the sub-agent, but had been deposited with him temporarily for safe keeping. The superintendent denied that such statement was made to him and the superintendent did not communicate it to his counsel.

*Held*, That the question whether plaintiff's story were true, and if it were true whether the superintendent acted in good faith in stating the case to the counsel, were facts properly left to the determination of the jury.

That the question of the advice of counsel was for the jury. They were to determine in considering the question of probable cause whether the advice was sought in good faith.

The Court charged the jury that if they should find that the prosecution of plaintiff was authorized by the corporation and that it had failed, they should then consider the question of probable cause. That upon this branch of the case they were to determine whether the charge of embezzlement was true; if it was, then there was an end of the case, and the verdict would be for defendant. If true in part only, then plaintiff might recover nominal damages. But if they should determine the charge was not true plaintiff was not necessarily to have a verdict; they were then to consider whether defendant had probable cause to believe the charge true, and if he

had, then the verdict was to be for defendant.

*Held*, No error.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs; *Barnard, P. J.*, dissents.

### FALSE REPRESENTATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

William A. Tyler, *respt.*, v. Timothy Guy, *applt.*

Decided Jan., 1885.

Where both the vendor and vendee of land went upon the premises to be sold and the vendor correctly pointed out the boundaries and stated that the premises contained a certain number of acres, which may overrun or fall short, that he bought them as containing that number, but had never had them surveyed, and it does not appear that he had knowledge that his statements were false, he is not liable as for false and fraudulent representations in case the quantity of land is less than he stated.

Appeal from judgment entered on report of a referee.

On May 10, 1881, defendant conveyed to plaintiff two pieces of land, in Afton, N. Y., the deed describing each piece by lands of adjoining owners, without giving distances or other facts from which quantities could be computed, the descriptions concluding as follows: "About two acres of land, be the same more or less;" "Supposed to contain six acres of land, be the same more or less." There was no written contract of sale.

The complaint alleged, among other causes of action, that defend-

ant falsely and fraudulently represented, in the oral negotiations, that the two pieces contained nine acres of land, when, in fact, they contained but six.

The referee found against plaintiff on all the other causes of action, and in relation to this, found as follows: "That defendant, as a part of the negotiations leading to said exchange and purchase, and previous thereto, and at the time said plaintiff and S. viewed the premises, represented and stated to plaintiff that there were eight acres of land in said premises, and it might overrun or fall short; that he had bought it for that, but he had never had it surveyed, and defendant then and there stated to said plaintiff that there were two acres in the parcel where the buildings were located, and six acres in the other parcel; that the defendant, at the time of making such representations and statements, did not know whether the same were true or false, and did not know whether there were eight acres in said premises or not, and did not know the amount of land in either parcel; that plaintiff did not know the amount of land, and relied upon such statements and representations in making such exchange and purchase, and such statements and representations were an inducement thereto;" "that defendant correctly pointed out the boundaries of the two pieces of land, and that there are but 6.27 acres of land in the two parcels," and on this issue found in favor of plaintiff and assessed his damages at \$200.

*Millard F. Brown*, for applt.

*Stephen C. Millard*, for respt.

*Held*, Error ; Both parties were upon the land and each had an equal opportunity of ascertaining the quantity. There is no evidence that defendant knew that his statements were false, and, in fact, the referee finds that he did not know that they were untrue. There is nothing in the case from which it can be inferred that defendant believed or suspected that his statement of quantity was erroneous.

In *Bennett v. Judson*, 21 N. Y., 238, the land sold was in the States of Indiana and Illinois. The purchaser had never seen the lands, and the agent of the vendor made positive statements in regard to the situation of the property, as to proximity to railroads, which were untrue ; upon which the purchaser relied and had a right to rely. If the purchaser in that case had traveled with the vendor from the railroad to the land sold, and he had said that the distance was 10 miles, that he had been told so, but had never measured it, and it had turned out to be 15, it would hardly be maintained that an action for fraudulent representation would lie. The case cited rests upon the rule that when a person makes a statement of facts which is actually untrue, and he has at the time no knowledge of the matter, he is chargeable with fraud and his claim to have believed in the truth of his statement cannot be regarded as at all material. In the case at bar, defendant had knowledge upon the subject, and

truthfully explained to plaintiff the sources of his knowledge, and, as it is found in another finding, correctly pointed out the boundaries of the two pieces of land.

There is no rule of law or equity upon which this judgment can be sustained. *Pomeroy Eq. Jur.*, § 886-888 and cases cited ; 45 N. Y., 169.

Judgment reversed and new trial ordered before another referee, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

## APPEAL. PRACTICE.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. The Gold and Stock Tel. Co. *applt.*

Decided March 3, 1885.

As neither the existence of Chap. 151, Laws of 1882, amending Chap. 361, Laws of 1881, nor the Comptroller's practice thereunder, was within the issues in the action or could affect its determination motion for reargument was denied.  
Sec. S. C. 20 W. Dig. 566.

This was a motion for a re-argument or for modification of decision and remittitur in the above entitled action, 20 W. Dig., 566. It appeared that Chapter 151, Laws of 1882, amending Chapter 361, Laws of 1881, provides (§ 11) that if the comptroller is dissatisfied with the report of any association, corporation or joint stock company liable to tax under any of the provisions of this act, whose capital is only partially employed within this State, he may fix the amount of capital stock which shall be the

basis for tax and settle an account for the taxes, penalties and interest due the State thereon, and any association, etc., dissatisfied with the account so settled may appeal therefrom to a board consisting of the Secretary of State, Attorney General and State Treasurer whose decision shall be final. It also appeared that it had been the custom of the Comptrollers to tax corporations like defendant, on only so much of their capital as is represented by their property in this State. Defendant's counsel showed by affidavits that they were not aware of this practice of the Comptroller and that their attention had not been called to the amendment of the act of 1881, and they asked that the affirmance of the judgment, as modified in respect to interest, be without prejudice to any application on the part of defendant to the Supreme Court for leave to apply to the Comptroller for relief under the act of 1882 or to any application to the Supreme Court with reference thereto.

*Wager Swayne and Matthew Hale*, for motion.

*D. O'Brien*, att'y gen'l, opposed.

*Held*, That as the act of 1882 has no relation to any issue in the action, and neither its existence nor the Comptroller's practice under it could affect the determination of this case, the motion should be denied.

Opinion by *Danforth, J.* All concur.

## ASSOCIATION. PLEADING. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

Charles Brooks, *respt.*, v. The  
Farmers' Creamery Association,  
*applt.*

Decided Dec., 1884.

Where the pleader intended to sue a joint stock association and yet omitted to name the President or Treasurer or the individuals comprising it, a general appearance of defendant waives this defect. It is however incumbent on plaintiff to prove the existence of such association by competent evidence, as this question is sufficiently put in issue by the general denial. Where there is no allegation in the complaint that defendant was a corporation, a specific denial is not necessary in the answer.

One Thompson was alleged to be superintendent and manager of defendant, and he appeared and answered as such. The merits were all with the plaintiff. The judgment was under § 8063 of the Code affirmed in favor of plaintiff notwithstanding technical errors.

Appeal from judgment of County Court, affirming judgment in Justice's Court.

Action for \$179, the value of goods sold and delivered. The sale and delivery was duly proven, and defendant admitted an indebtedness of \$134 upon the cause of action sued upon by tendering that amount in court. Defendant was not sued as a corporation, but the pleader alleged that it was an association composed of seven persons and upwards and that one Thompson was superintendent and manager. Thompson having been served with a summons appeared

and answered as manager by a general denial.

*D. F. & H. Gedney*, for applt.

*Eugene D. Slokem*, for respt.

*Held*, That it is plain that the pleader intended to sue defendant as a joint stock association although he has not named the President or Treasuerr or the individuals composing it.

By a general appearance defendant could waive the objection that the President or Treasurer was not named, but it was incumbent on plaintiff to prove the existence of such association by competent evidence, which was not done. 14 How., 256. A general denial put this question in issue. 14 Hun., 256.

It was not necessary for defendant to put in a verified answer alleging that it was not a corporation, as required by § 1776 of the Code, inasmuch as that was no allegation in the complaint that defendant was a corporation.

There is nothing in the case to show who or what is made a party defendant. Neither does the case show any service of process upon any officer of any corporation or association competent to receive a summons in an action against such defendant. It does not follow that because plaintiff did not name a President or Treasurer of the association he must have sued defendant as a corporation.

However, it does not affect the merits of the action, which are all with plaintiff, whether defendant was sued as a corporation or a joint stock association, inasmuch as it appears that there was an ap-

pearance and joinder of issue by the name by which defendant was sued.

Notwithstanding the technical errors, under all the facts and circumstances, the judgment is affirmed under § 3063 of the Code, but without costs of the appeal.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

## FRAUD. ATTORNEYS.

### N. Y. COURT OF APPEALS.

*Stout et. al., respts., v. Smith, applt.*

Decided Jan. 20, 1885.

Dishonest conduct of a person, in the absence of any definite and established relation of confidence, does not furnish any valid legal ground for setting aside a contract in an action to recover damages by reason of undue and improper influence exercised over the party with whom he has been dealing.

In an action for damages for fraud in exchanging lands it appears that defendant, who was an attorney and also a banker, drew all the papers. It did not appear, that he was ever employed by plaintiffs in any litigation or received a retainer from them or agreed to act as their attorney. *Held*, insufficient to establish the relationship of attorney and client between them.

This action was brought to recover damages for fraud arising out of various transactions in the exchanging or sale of farms between plaintiffs and defendant. It was claimed that the relation of attorney and client existed between defendant and plaintiffs. It appeared that defendant was an attorney at law, but that his principal business was that of a banker

and that he did not practice law to any great extent, only making collections for his bank and occasionally for others. There was no positive evidence that he was employed by plaintiffs as their attorney in the transaction in question, or that he ever received any pay for his services as such attorney or that he was ever employed by them in any litigation. It was proved by one of the plaintiffs that he was the attorney against them in an action to foreclose a mortgage. One of the plaintiffs testified that the defendant did all the writing between them and stated it would not cost plaintiffs anything and that they need not carry the papers to anyone else to show them because they were right; that he claimed to be a lawyer, which fact the witness knew and said he would not rob them of a cent. The widow of the other plaintiff, who was present at the same time, testified that she knew no more about defendant's being a lawyer than that he claimed when he wanted so draw up the papers that he was a lawyer and his writings should not cost them anything and he could do the business. The papers drawn were in the proper form. It did not appear that defendant offered or gave any advice or that he ever received a retainer from plaintiffs or agreed to act as their attorney. The court was requested to charge: "That there is not sufficient evidence that on June 30, 1871, the relation of attorney and client existed between defendant and the Stouts." This request was refused and an exception taken.

*David B. Hill*, for appls.

*Rufus King*, for resp.

*Held*, Error; That there was not sufficient evidence to establish the fact that the relationship of attorney and client existed between defendant and plaintiffs, and that question was improperly submitted to the jury.

It appeared that plaintiffs were persons of ordinary intelligence, could read and write and had an opportunity to examine, or to have examined, the papers which passed between them and defendant; there was no proof that any confidential relationship or intimacy existed between the parties. The court was requested to charge: "That there is not sufficient evidence of undue influence to justify the jury in relieving the Stouts from their contracts upon that ground." This request was refused and an exception taken.

*Held*, Error; The fact that defendant was engaged in a business from which it may be inferred that he was better qualified to make bargains and obtain advantages by reason of his capacity, shrewdness and superior ability does not of itself lead to the conclusion that any advantage was obtained by means of undue influence. Dishonest conduct of a person in the absence of any definite and established relation of confidence does not furnish any valid legal ground for setting aside a contract in an action for the recovery of damages by reason of undue and improper influence exercised over the party with whom he has been dealing.

Judgment of General Term, af-



firming judgment on verdict for plaintiffs, reversed and new trial granted.

Opinion by *Miller, J.*; all concur; *Ruger, Ch. J.*, and *Earl, J.*, on the first ground.

#### CIVIL DAMAGE ACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Margaret Grady, respt., v. Henry Prigge, applt.*

Decided Dec., 1884.

In an action brought by a wife under the Civil Damage Act the court admitted evidence to show a request from plaintiff to defendant not to sell liquors to her husband; a notice to defendant that the husband was in the habit of abusing plaintiff; that defendant had previously sold liquor to the husband, and that the liquor was sold without a license. *Held*, No error.

Appeal from judgment entered on verdict at Circuit in favor of plaintiff.

Action under the "Civil Damage Act."

*Jesse Johnson*, for applt.

*M. J. Keogh*, for respt.

*Held*, The act of 1873, upon which this action is based, in express terms authorizes the jury to give such exemplary damages as may be proper. Therefore, the testimony tending to show a request from this plaintiff to defendant not to sell liquor to her husband; a notice to defendant that the husband was in the habit of abusing his wife, and that defendant had previously sold liquor to the husband is relevant.

Testimony to show that the liquor was sold without a license was also relevant. 95 N. Y., 632.

Judgment affirmed.

Opinion by *Pratt, J.*; *Barnard, P. J.*, concurs.

#### COUNTY TREASURER. PARTITION. INFANTS.

N. Y. COURT OF APPEALS.

*Mills et al., respts., v. Odell et al., appls.*

Decided Jan. 20, 1885.

On a sale on partition a mortgage was taken by the referee and assigned to O. as county treasurer. In an action for misappropriation of the proceeds by O. it appeared that he held two prior mortgages on the property, and both he and the attorney for the plaintiff in the partition suit testified that the mortgage was assigned to him to pay said mortgages and on an agreement to repay the balance to the referee. The referee testified that nothing besides the mortgage was paid to O. It also appeared that O. did not know that any of the parties to the partition suit were minors. *Held*, That a finding that the mortgage was assigned to O. on account of the shares of the infant defendants was not justified by the evidence, and that the report of distribution of the referee was not competent evidence against O. of the facts stated therein.

This action was brought on the official bond of defendant O. as Treasurer of Westchester County, against him and his sureties, by plaintiffs, the heirs at law of one M., who had been defendants in an action for a partition of the lands of M. It appeared that under the judgment of partition certain of the premises were sold to W. T. M. for \$21,000, free of incumbrances. One A. assumed the purchase. The referee conveyed to

W. T. M. and concurrently therewith the latter conveyed to A., who gave back a mortgage for \$10,000, which M. assigned to the referee in part payment of the purchase money. It was proved that O. as county treasurer held a mortgage upon the property sold for \$4,462.65, and that there was another mortgage thereon for \$461.60, which O. had previously held, and that these mortgages were incumbrances, which by the judgment in partition the referee was directed to pay out of the proceeds of the sale. O. and plaintiff's attorney in the partition suit testified that the \$10,000 mortgage was assigned to O. to pay said two mortgages, and upon an agreement that the balance should be paid to the referee. The referee says, in general terms, that he assigned the \$10,000 mortgage pursuant to the direction of the judgment, but it appeared that he knew nothing of the actual arrangement, the whole matter being left by him to plaintiff's attorney. The mortgages for \$4,462.65 and \$461.60 were satisfied of record a few days after the assignment to O. of the \$10,000 mortgage. There was no evidence that O. ever received any of the proceeds of the partition sale beyond the \$10,000 mortgage. The referee's report of distribution made in 1876, nearly four years after the assignment of the \$10,000 mortgage, accounts for the \$21,000 purchase money of the premises sold to W. T. M., by stating that he paid to O. \$6,493.35 in satisfaction of the two mortgages, \$216.16 for taxes, and received in cash \$4,292.-

49 and a mortgage for \$10,000 which he assigned to O., county treasurer, under the provisions of the judgment. The referee testified on the trial in substance that O. never received anything beyond the \$10,000 mortgage from the proceeds of the sale. It appeared that O. never saw the decree, and although he knew generally that there was an action in partition, he did not know that any of the parties were minors. The trial judge found that the \$10,000 mortgage was assigned by the referee to the county treasurer under the provisions of the decree in partition, on account of the shares of the infant defendants in that action. The breach of the treasurer's bond alleged in the complaint was the conversion and misappropriation of the proceeds of the \$10,000 mortgage.

*Calvin Frost and Francis Larkin* for appls.

*Wilson Brown, Jr.*, for respts.

*Held*, That the finding of the Court was not justified by the evidence; that if the \$10,000 mortgage was taken by the county treasurer for the purpose and upon the agreement testified to by him and plaintiff's attorney, he did not receive it in fact for or on account of the infant defendants in the partition suit, nor will the law adjudge him so to have received it.

*Also held*, That the referee's report of distribution made in 1876 was not competent evidence against O. of the facts stated therein.

Judgment of General Term,

affirming judgment for plaintiffs, reversed and new trial ordered.

Opinion by *Andrews, J.* All concur.

### MARRIAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Horatio G. Roberts, *applt.*, v. The Ogdensburgh & Lake Champlain R.R. Co., *respt.*

Decided Dec., 1884.

A statute of the State of New Hampshire in force in 1862 declared absolutely void a marriage where either party has a former wife or husband living, knowing such wife or husband to be alive. *Held*, That the word "former" as used in this connection means a continuing relation, and that the husband or wife must be such when the second marriage is solemnized, and accordingly where one divorced for adultery in Massachusetts went over into New Hampshire and married that this marriage not prohibited in New Hampshire was valid everywhere.

Plaintiff brought this action to recover damages for injuries sustained by his wife born Adaline Smith. The complaint was dismissed upon the ground that she was not his wife. Adaline in 1856, in Canada, married one Taylor. They moved to Lowell and in 1861 Taylor obtained a divorce from her for her adultery. In Jan., 1862, plaintiff and Adaline were married at Lowell, Mass.; doubting the validity of this marriage they in March went to Nashua, N. H., and were again married. In May, 1862, plaintiff and Adaline came to this State and lived here as husband and wife until her death in 1883, shortly before the trial. Tay-

lor is living and was a witness on the trial.

*S. A. Kellogg*, for *applt.*

*L. Hasbrouck*, for *respt.*

*Held*, That the marriage in New Hampshire was valid there and hence everywhere. (It was conceded that the marriage in Jan., 1862, in Mass., was void by the Massachusetts statute.) The New Hampshire statute provides that all marriages where either party has a former wife or husband living, knowing such wife or husband to be alive, shall if solemnized within the State be absolutely void, without any decree of divorce or other legal process. We think the word "former" as used in this statute means a continuing relation, that the husband or wife must be such when the second marriage is celebrated in New Hampshire. Here the divorce was absolute and Adaline Smith was no longer the wife of Taylor in 1862. The Massachusetts statute forbidding the guilty party to marry has no extraterritorial force. 92 N. Y., 521; 92 Id., 146; 86 Id., 18; 90 Id., 602.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Fish, J.*, concur.

### EMINENT DOMAIN. LIMITATION.

N. Y. COURT OF APPEALS.

Mark, et. al., *appls.*, v. The State, *respt.*

Decided Jan. 20, 1885.

A failure by the owner of property taken for canal purposes to make claim for damages within one year as prescribed by

1 R. S., 225, § 48, divests him of all right thereafter to claim damages arising as an incident to such taking.

The claims mentioned in Chap. 321, Laws of 1870, are of a different character from those provided for by said § 48.

This was an appeal under Sec. 10, Chap. 202, Laws of 1883, from a decision of the Board of Claims upon a claim presented by appellants for lands appropriated by the State in 1854 for canal purposes; and for injuries to certain ferry rights belonging to them, caused by such appropriation.

At the time the lands were taken, § 48 of 1 R. S., 225, which required every person interested in lands so appropriated, intending to make any claim for damages, to do so within one year after the taking was in force. No claim was made by the appellants within the time required. They claimed however that Chap. 321 of the Laws of 1870, conferring upon the Canal Commissioners jurisdiction to "hear and determine all claims against the State \* \* \* for damages alleged to have been sustained \* \* \* from the canals of the State" authorized this claim. Nothing was awarded.

*Charles E. Patterson*, for appls.

*D. O'Brien*, attorney general, for resp't.

*Held*, No error; that plaintiffs, by failing to make a claim for damages within the time required by the Revised Statutes, waived all right thereto and the State became vested with a perfect title to the land, free from any claim or right existing in the owners at the time it was taken. Not only were

they divested of their title to the land taken but of all right to damages arising as an incident to the taking of the same.

*Also held*, That the claims mentioned in the Act of 1870 (Chap. 321) were of a different character from those provided for in § 348 of 1 R. S., 225.

*People ex. rel. Jermain v. Thair*, 4 Hun., 798; 63 N. Y., 348; distinguished.

*Also held*, That as the impairment of the ferry right was but an incident of the appropriation, damages therefore could not be divided from the damages for injury to the land so as to be presented as a separate and distinct claim.

Award of Board of Claims affirmed.

Opinion by *Miller, J.* All concur.

## EXECUTION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Charles G. S. Baker, applt., v. Jarvis S. Baker, resp't.*

Decided Dec., 1884.

In an action where it was doubtful whether the complaint was framed in contract or on tort, the defendant at the trial denying all of the facts which founded in tort, admitted an indebtedness for the money sued for, whereupon plaintiff asked for a direction of the verdict, which was done. *Held*, That thereby plaintiff elected to base his action upon contract and not upon tort. That under the circumstances if any claim was to be made that defendant was liable to arrest, the jury should have been asked to find whether the money left with defendant was a special deposit or a loan. That an execution against the defendant's person, under the circumstances, should not be allowed.

Appeal from order of Special Term, vacating and setting aside an execution against the person.

Action for money left with defendant.

The answer distinctly denied all the allegations upon which the tort depended, and averred that the money was a loan. Defendant testified in the broadest manner, in opposition to plaintiff, that the money was a loan, but no attempt was made to deny the indebtedness. On motion the court directed a verdict.

*J. H. Drake*, for applt.

*Wm. V. Hilliard*, for respt.

*Held*, That it was doubtful whether the complaint contained a cause of action founded in contract or in tort. 15 How. Pr., 97.

That in view of the facts and circumstances, if any claim was to be made by plaintiff that defendant was liable to arrest in the action, the jury should have been asked to pass upon the disputed question whether the money was left with defendant as a special deposit for safe keeping only or whether it was a loan to defendant. In one case the defendant had the right to use the money, in the other he had not.

Had a special verdict been rendered determining that question in defendant's favor the court would have been in a position to maintain and enforce such remedies as the law provides in such cases. On the contrary, plaintiff's counsel, by calling upon the court to direct the verdict, in effect yielded the disputed question of fact and consented to receive and

abide by such relief as the disputed evidence showed to be his right. Thereby plaintiff elected to rest the action as based upon contract and not upon tort. 87 N. Y., 135. That after obtaining judgment upon that theory, to allow an execution against defendant's person would be an unjust advantage.

Order affirmed, with costs.

Opinions by *Pratt* and *Dykman*, JJ.; *Barnard*, P. J., not sitting.

### WILLS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Mary Renihan*, applt., v. *Martha A. Dennin*, individually and as exrx., respt.

Decided Dec., 1884.

The testator was dying of acute peritonitis, was heavy and listless, and under the influence of opiates. About an hour and a half before his death, but not at his request, a lawyer was summoned to make his will. The testator did not volunteer to the lawyer any suggestions as to the provisions of the will and all instructions were gotten by questioning him in the simplest way. Once the testator said he would not make a will that night, but the doctors advised him that he had not long to live. *Held*, That probate should be refused and that the issues of undue influence and a want of testable capacity must be tried by a jury.

Appeal from decree of Surrogate, admitting to probate the will of *James Dennin*. Appellant is his only sister, respondent is his widow. He had no children. His age was 48. The will was made about an hour and a half before his death. He was dying of acute peritonitis and his bowels were probably perforated; he was

sinking rapidly, vomiting violently black matter, was heavy and listless from the shock of perforation and was under the influence of opiates. It did not appear that he expressed a desire to make a will. His niece requested the attending physician to procure a lawyer and have his will made. The physician did so. The lawyer testified that he got his instructions from the testator by asking questions of him. After being told that the lawyer had come at the request of the doctor, the testator said, "Yes" and nothing more. The lawyer finally asked him what he wished to do with his property. The testator answered, "Give it to my wife." After the will was partly drawn it was read to the testator who said, "I guess I won't make a will now. I am not going to die to-night." The doctor interposed and said "You are a pretty sick man, and if you have any affairs to attend to, you had better do it now." The lawyer then asked him further questions to which he answered in monosyllables. Names of witnesses to the will were proposed to him, he said "Yes." With the aid of the lawyer the testator made his mark. The lawyer then asked "Did you ever have a will drawn before?" Ans. "No." He then asked "Is that your last will and testament?" Ans. "Yes."

*E. Countyman*, for applt.

*Samuel Hand*, for resp't.

*Held*, That probate should have been refused. We think that the urgency of the physician and draughtsman contributed too much to the making of the will. They

were strong men; they meant no unkindness, but they were not easily to be put aside. The rule laid down in the *Rollwagen* case, 63 N. Y., 504, extends to the act of making a will as well as to its provisions. It is there said that whenever it appears, by the facts and circumstances surrounding the testator at the time of the execution of the will, that the influence of another was exercised over him sufficiently to destroy free agency it is undue influence. Within this rule undue influence appears here. We are doubtful also whether, under the rule in *Delafield v. Parish*, 25 N. Y., 9, 29., Dennin had testable capacity. His mind could with difficulty be fixed upon the simple questions asked him long enough to answer them. And once he roused himself sufficiently to comprehend that the lawyer was attempting to make his will and he attempted to put a stop to it. But his feeble mind was subdued by the stronger minds about him.

Decree reversed and the issues relating to undue influence and capacity to be tried by a jury, costs to appellants payable out of the estate.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

PLEADING. SHAM DENIAL.  
N. Y. COMMON PLEAS. GENERAL TERM.

Arthur G. Shearman et al.,  
*appls.*, v. Samuel C. Boehm et al., *respts.*

Decided Jan. 16, 1885.

Each denial of separate allegations of the complaint is a separate defense, and as such may be stricken out in a proper case. Where it uncontradictedly appears that defendant must have personal knowledge of the allegations denied by him "on information," such denial may be stricken out as sham.

Appeal from order denying plaintiff's motion to strike out the first defense to plaintiff's first cause of action. Such defense is as follows: "And further answering on their information and belief, they deny each and every allegation in said complaint constituting the plaintiff's first alleged cause of action." The motion was to strike out the defense as sham or that the answer be made more definite and certain as to what allegations were so denied, and that plaintiffs have such other and further relief as may be just. The court at Special Term held that the matter complained of was a part of a defense, and, as a part of a defense could not be stricken out as sham, Code § 538, denied the motion. It appeared from the uncontradicted affidavits that the denial in the answer was false because certain of the transactions alleged in the complaint, and covered by the denial, were personal transactions between plaintiffs and defendants.

*W. Parker*, for applt.

*Jerolomon & Arrowsmith*, for resp't.

*Held*, That the matter complained of was not part of a defense. Each denial of separate allegations of the complaint is a separate defense and may be stricken out. 2 E. D. Smith, 400.

A denial of those personal trans-

actions "on information" is a sham and false denial and should be stricken out. It is no objection to granting this motion that a general or specific denial cannot be stricken out as sham. The decision in *Wayland v. Tysen*, 45 N. Y., 281 applies to those denials made in the form authorized by § 500 of the Code, viz: absolute denials or denials of information sufficient to constitute a basis of belief. It has been held that a denial "on information and belief" may be made where the defendant has no positive knowledge and is prepared to assert upon such information as he possesses that the allegations of the complaint are false. 21 Hun, 436. Such denials cannot be regarded as frivolous; 5 Abb. N.C., 90, nor as irrelevant or redundant. 21 Hun, 436. But it has not been held that such a denial is not subject to a motion to strike it out as sham where it appears by uncontradicted proof that the defendant must have personal knowledge of the allegations he denies "on information." It is in effect an allegation in the answer that the only knowledge which defendant possesses is derived from information and that he had formed a belief from such information that the averments of the complaint are false. If that allegation is untrue because the averments of the complaint are of personal transactions, the remedial provision of § 538 permitting sham defences to be struck out on motion should be applied, and the decision in *Wayland v. Tysen* (above), should not be extended to cover the case.

Motion to strike out granted, with leave to amend on payment \$10 costs motion and \$10 costs appeal and disbursements.

Opinion by *J. F. Daly, J.*; *Allen, J.*, concurs; *Larremore, J.*, dissents.

### EVIDENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Helen Moore et al., v. Allison Oviatt, impled.

Decided Jan., 1885.

The meaning of the words "interested in the event," as used in § 829 of the Code, should be construed to mean, and limited in application to, the issue or question as to which the witness is called to testify.

Where questions other than those embraced in the issue were referred to a referee and were passed on in his report, and judgment has been entered thereon, *Held*, that a motion for new trial was properly made in this court in first instance.

Motion made in this court in first instance by defendant for new trial on a case in action for partition, after interlocutory judgment on referee's report and before final judgment.

Thomas Oviatt died intestate owning the lands sought to be partitioned. His heirs were his two children, Helen Moore, one of the plaintiffs, and defendant Allison, and Frances Oviatt, one of the plaintiffs, a grand-daughter of decedent and only child of Miles Oviatt, deceased. Decedent's wife survived him, and is a defendant. In his answer Allison alleged that decedent in his lifetime deeded certain lands to Miles by way of advancement. Plaintiffs denied

this in their reply. The widow did not answer. The issue thus joined was referred and the referee reported against Allison on the question of the advancement. On the trial it was established that decedent had conveyed certain lands to Miles, of the then value of \$1,000. In that conveyance the widow joined, releasing her inchoate right of dower. Allison called as a witness the widow, and offered to prove by her that said conveyance was executed without consideration, and as a deed of gift, and was intended as an advancement to Miles. The evidence was excluded on the ground that the witness was incompetent under § 829 of the Code.

*George H. Phelps*, for motion.

*J. R. & M. B. Jewell*, opposed.

*Held*, Error. The widow was not interested in the question of the advancement. Her estate in the lands to be partitioned was admitted in the pleadings. Her right of dower will be the same whichever way the issue between the other parties may be decided. See 1 Green. Ev., § 390; 62 N.Y., 83; 78 Id., 283; 30 Hun, 555. See also 1 Green. Ev., §§ 356, 357, 361, 395, and cases cited.

The motion was properly made here in first instance, as provided in § 1001 of the Code, without an appeal from the interlocutory judgment. 3 Hun, 262; 65 Barb., 58; Old Code, § 268; 22 How., 162.

Interlocutory judgment and referee's report set aside and new trial granted before another referee. All questions of costs reserved until final judgment.



Opinion by *Barker, J.*; *Haight* and *Bradley, JJ.*, concur.

## CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respts.*, v. Henry Williams, *applt.*

Decided March, 1885.

Previous to the enactment of Art. XIV of the Amendments to the Constitution of the U. S., Art. VI of said Amendments declaring that in criminal prosecutions the accused shall be confronted with the witnesses against him had no application beyond the courts of the U. S. and criminal prosecutions therein, and did not apply to proceedings in the State courts.

Whether Art. XIV of the Amendments to the Constitution of the U. S. makes Art. VI of said Amendments applicable to the State courts, *quære*.

In order to satisfy the requirements of Art. VI of the Amendments to the Constitution of the U. S., it is not essential that the accused should be confronted with the witnesses against him upon the trial itself, but said Art. is satisfied, in cases of necessity, if the accused has been once so confronted in any stage of the proceedings, and has had the opportunity of examination that such confronting was intended to secure.

The Constitution of the State of N. Y. contains nothing equivalent to Art. VI of the Amendments to the Constitution of the U. S. Such a provision is contained in the "Bill of Rights" (1 R. S., 6th Ed., 375) which is a legislative enactment, and subject to modification or repeal by subsequent legislative action.

Sub. 3 of § 8 of the Code of Criminal Procedure, providing that the deposition of a witness taken before the magistrate, in the presence of the defendant, who at the time had an opportunity of cross examining the witness, may, under certain circumstances, be read in evidence upon the trial, is not unconstitutional.

Appeal from judgment of the General Sessions convicting the

defendant of the crime of larceny in the first degree.

Upon the trial the deposition of a witness taken upon the examination of the defendant before the committing magistrate was read in evidence under sub. 3 of § 8 of the Code of Criminal Procedure, permitting such a deposition to be so read when the defendant, upon the preliminary examination, had an opportunity to cross examine the witness, and it is shown that the witness is dead or insane or cannot, with due diligence, be found in this State. This was objected to by defendant, upon the ground that the said section of the Code was unconstitutional, in that it deprived him of his right to be confronted with the witnesses against him.

*William F. Kintzing*, for *applt.*

*John Vincent*, Ass't Dis't Att'y, for *respt.*

*Held*, That previous to the adoption of Art. XIV of the Amendments to the Constitution of the U. S., Art. VI of said Amendments, declaring that in criminal prosecutions the accused shall be confronted with the witnesses against him, had no application beyond the courts of the U. S. and criminal prosecutions therein, and did not apply to such proceedings in the State courts. 20 How., U. S. 84, 90-91; 92 U. S., 90; 92 Id., 542; 95 Id., 294. That it is doubtful but what § 1 of Art. XIV of the Amendments to the Constitution, declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the U. S., etc., secures in State courts what was already secured in federal courts, to wit: that the accused shall be confronted with the witnesses against him.

That it is, however, unnecessary to discuss that question, for it is not essential, in order to satisfy the requirements of Art. VI of the Amendments to the Constitution of the U. S., that the accused should be confronted with the witnesses against him upon the trial itself, but that it is sufficient, when it is impossible to produce said witnesses upon the trial, if the accused has been once so confronted, in any stage of the proceedings, and has had the opportunity of examination that such confronting was intended to secure, Cooley on Constitutional Limitations, 3d Ed., 318; 12 Wend., 41; 5 Hill, 295; 7 Iredell, 225; 5 Ohio, 325; 73 Penn., 321; 18 Pick., 437; 13 Iredell, 134; 8 Ohio, 131; 33 Ark., 539, and consequently § 8 of the Code of Criminal Procedure does not violate this provision of the Constitution of the U. S.

That the Constitution of the State of N. Y. does not contain any provision equivalent to Art. VI of the Amendments of the Constitution of the U. S. Cons. of N. Y. § 6 Art. I. That such a provision is contained in the statute known as the "Bill of Rights," 1 R. S., 6th Ed., 375, but that this statute is a legislative enactment, and, assuming that § 8 of the Code of Criminal Procedure is in conflict with it, it is, in that case, only the conflict of a later enactment of the legislature

with a former one, and the effect is that the later must prevail as an amendment, modification or repeal of the former. 1 Com., 386; 57 Cal., 567; 29 Ark., 17.

That sub. 3 of § 8 of the Code of Crim. Proc. is, therefore, not unconstitutional, and the judgment should be affirmed.

Opinions by *Davis, P.J.* and *Daniels, J.*; *Brady, J.*, dissents.

## PRACTICE.

### N. Y. COURT OF APPEALS.

*Arnold, applt., v. Parmelee et al., respts.*

Decided Jan. 20, 1885.

Where on the trial of issues of fact in an equity action improper evidence is received under objection and on the trial at Special Term before another judge a case containing such evidence is offered and received without objection. *Held*, that the right to object to the evidence on appeal was waived.

This action was brought for the foreclosure of a mortgage. Certain issues of fact were tried by a jury. On the trial evidence thereof that was clearly inadmissible was received under objection and exception. On the final trial at Special Term a case containing the evidence on the jury trial, which was presided over by another judge, was offered and received in evidence without objection. It was claimed that the exceptions taken to the rulings of the court on the trial before the jury are now available.

*Myron H. Peck*, for applt.

*J. A. Stull*, for respt.

*Held*, *Untenable*; that under the

circumstances plaintiff must be held to have waived his right to object to the evidence upon appeal. If he had intended to rely upon his objections his counsel should have so stated and asked the judge at Special Term to make a ruling as to the admissibility of the evidence, either by objection or by a motion to strike out.

Judgment of General Term, affirming judgment of Special Term, affirmed.

Opinion by *Miller, J.*

All concur, except *Danforth, J.*, taking no part.

#### DOWER.

##### N. Y. COURT OF APPEALS.

*Aikman, respt., v. Harsell et al., applts.*

Decided Feb. 10, 1885.

To constitute an assignment or admeasurement of dower by virtue of any agreement or any specific act of the party, it should be clearly manifest that such was the intention.

Affirming S. C., 18 W. Dig., 839.

This action was commenced in July, 1879, for the admeasurement of plaintiff's dower in the estate of J. B., deceased. It appeared that in 1848 W. A. B. died intestate leaving a widow, L. A. B., and two children, viz: J. B., and his sister, Mrs. P. It appeared that in 1855 L. A. B. joined in a lease with J. B. and Mrs. P. of the property left by her husband for a term of five years; that J. B. collected the rent under the same until his death in 1859, and his widow, the plaintiff, after that time. Thereafter Mrs. P. assumed

full charge of the whole property and executed leases thereof in her own name as lessor until her death in 1866. She left a will appointing trustees to whom she devised her estate, and such trustees, with L. A. B. and plaintiff as lessors, at the expiration of the leases given by Mrs. P. executed new leases for terms not exceeding two years at a time, and by the terms of two of these leases rent was made payable, 3-9 to said trustees, 5-9 to L. A. B. and 1-9 to plaintiff; the other leases did not state what portion of the rents each was to receive. It was stated by one of the trustees at the time that the object of drawing the leases in this form was to protect himself so that he would not be called on as trustee for Mrs. P's estate, to account for the whole rent. It was not shown that L. A. B. ever received any of the rents arising from the first lease. The leases executed by Mrs. P. did not show that L. A. B. or plaintiff had any interest in the premises demised. All the premises were not included in the leases introduced in evidence, and some of the real estate was unoccupied at the time L. A. B. died. It was claimed that L. A. B. received and accepted one-third of the net rents and income of the real estate from the death of her husband in 1848 until her own death in 1878 as her dower in said premises, and that this was in effect an assignment of dower.

*Sidney S. Harris*, for applts.

*George C. Blanke*, for respt.

*Held*, Untenable; that the receipt of one-third of the rents, and

the leases whether taken separately or together did not constitute an assignment of dower. 7 N. Y., 201; 2 Scribner on Dower, 2d ed., 83, 85, 253; 1 Washb. R. P., 4th ed., 274. The right of a widow to dower until it is assigned is a mere chose in action, which is not the subject of a sale upon execution against her, and before assignment or admeasurement is only a claim. 2 N. Y., 245; 8 id., 113. To bar the dower the grant must be in fee tail, or for the term of her life. Coke on Littleton, 612.

The cases holding that where the property is not divisible the person entitled to dower may take a portion of the avails or the use of them for a proportionate period, do not apply where it does not appear that an agreement was made for that purpose, or the dower duly assigned according to law. To constitute an assignment or admeasurement of dower by virtue of any agreement or any specific act of the party, it should be clearly manifest that such was the intention.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Miller, J.* All concur.

#### NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Kennally, *respt.*, v. John Selleck, *applt.*

Decided Jan., 1885.

In an action for damages to plaintiff's farm

property caused by the spreading of a fire set by defendant it is error to exclude evidence offered by defendant to prove that there were woods so situated as to protect the fire from the wind and thus lessen the danger of its spreading.

Evidence should, as a general rule, be confined to facts, and not include conclusions and opinions of the witness.

Appeal from judgment of County Court, affirming justice's judgment.

Action to recover damages sustained by plaintiff in consequence of a fire set by defendant on his own lands whence it spread to plaintiff's lands. The parties owned adjoining lands, defendant's being north and plaintiff's south of the division line. Upon the question of defendant's negligence there was a conflict of evidence. Plaintiff's land was a tract of about 50 acres, half of which had been chopped over and a portion of the timber drawn away, but none of the land had been brought to a condition of tillage. Defendant's land along the division line was in like condition. At the time of the fire the weather was very dry, there having been no rain for the past four weeks. Defendant's purpose was to burn up the brush and clear his fallow land. The injury to plaintiff was the burning of some sawlogs and wood piled on his land not far from the line. Plaintiff gave evidence tending to show that at the time the fire was started the wind was blowing from the north. Defendant offered to prove that there was on the north and west of his clearing a large tract of growing timber. This was objected to by plaintiff as incompe-

tent, immaterial, and leading, and the objection was sustained. A witness who had for many years been a farmer was called by defendant and testified that he was present on the day the fire was set, that he knew the fallow in question, that the wind was from the northwest, and that it went down about three o'clock. He was then asked: "In your opinion was it proper to set fire at that time, all things considered?" The question was excluded.

*D. M. Darrin*, for applt.

*J. W. Dininny*, for respt.

*Held*, That it plainly bore on the propriety of defendant's act that his clearing was surrounded on two sides by forests, which plainly are a great shelter to places and objects to the leeward, and which would render the fire unlikely to be blown on to the plaintiff's land. Defendant was entitled to prove every circumstance which had the least force as proof to meet the charge of negligence and to support the reasonableness of his conduct.

The ruling rejecting the question asked of the farmer was correct. The witness could not be allowed to express an opinion as to the very fact in issue, and concerning which there was much dispute.

*Ferguson v. Hubbell*, 26 Hun, 250, distinguished.

Both judgments below reversed, with costs.

Opinion by *Barker, J.*; *Haight* and *Rumsey, JJ.*, concur; *Bradley, J.*, not sitting.

[See 20 W. Dig. 386—Ed.]

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## SURETYSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Allen Benedict, applt.*, v. *Rutson Rea, respt.*

Decided Jan., 1885.

An agreement with one of two co-obligors, jointly and severally bound, not to sue him does not discharge the other obligor, but the other is liable for only one half the debt.

Appeal from judgment in favor of plaintiff, entered on the report of a referee.

Action upon a joint and several undertaking executed by defendant and one Leonard S. Standing under §§ 1327, 1334 and 1352, Code Civ. Proc., on an appeal by one S. Miller Benedict from a judgment recovered against him by plaintiff, the judgment declaring the debt a charge on real estate and decreeing its sale as in foreclosure, and directing him to pay deficiency if any. S. M. Benedict did not join in the undertaking. The General Term reduced the judgment and affirmed it as modified. The real estate was sold and a judgment for a deficiency of \$8,358.96 was docketed, on which an execution was issued and returned unsatisfied.

Defendant alleges, as a defense, that before the sale plaintiff and S. entered into an oral agreement that S. should purchase at the sale 110 acres of the land at not more than \$75 per acre, and convey it to plaintiff, and in consideration thereof plaintiff agreed not to sue S. on the undertaking. It was further alleged and found that such agreement was carried

out. The referee found, as conclusion of law, that by the agreement and its performance S. was discharged from all liability on the undertaking, and that defendant was only liable for \$4,793.12, one-half of the deficiency, for which sum and costs a judgment was entered for plaintiff.

*Cornelius E. Stephens*, for applt.

*Charles D. Adams*, for resp't.

*Held*, No error. An agreement not to sue a sole debtor, made on a good consideration, is not a technical discharge, but should the creditor be permitted to recover the debtor could recover the same amount in an action for a breach of the agreement, and, to avoid circuitry of action, the agreement not to sue is given the effect of a legal discharge. 2 Johns., 186; 4 Wend., 611; 1 Pars. on Cont., 28; Leake's Cont., 928.

An agreement with one of two co-obligors, jointly and severally bound, not to sue him does not discharge the other obligor, 2 Johns., 207; 21 Wend., 424; 2 Wm. Saund., 48, and notes; 1 Pars. on Cont., 28; 2 Chit. Cont. (11 Am. Ed.), 1357; 2 Chit. Pl. (16 Am. Ed.), 363-455, but as between the parties to the agreement it has the same effect as though made with a sole obligor.

*Harrison v. Close*, 2 Johns., 448, distinguished and explained.

The obligors, as between themselves, as between S. Miller Benedict and themselves, and as between plaintiff in this action and themselves, are co-sureties. 63 N. Y., 245, 250; Code Civ. Proc., § 1334. When one of two co-sure-

ties is discharged by the creditor the other co-surety is liable for but one-half of the debt. 70 N. Y., 537. Each co-surety is regarded as a principal debtor for his share of the debt, and as a surety for the remainder of the debt. For one-half of this debt S. stood as principal, and Rea, as to all the parties to the contract, stood as his surety. Sheldon on Subrogation, § 169, and cases cited. Plaintiff being a party to the contract was bound to regard the rights of these co-sureties. A surety may avail himself of any defense his principal may have. Id. § 101; L. R., 7 C. P., 372. The agreement not to sue being a good defense to an action on the undertaking against S., it is available to Rea as a defense to the recovery of the half for which S. stood as principal. Covenants not to sue are given the effect of a release to avoid circuitry of action, which the law is said to abhor. There is no reason why the principle should not be applied to avoid the necessity of two additional actions instead of one when all the actions arise out of the same subject matter and the damages to be recovered are precisely the same in the actions. See 2 Wm. Saund., 150, and notes; Mayne on Dam., 96. Under the doctrine of subrogation, if the whole claim should be recovered by Rea, he would be entitled to enforce the agreement not to sue. Sheldon on Subrogation, § 95.

The avails arising from the sale of the farm was the primary fund for the payment of plaintiff's debt, to which he was required to first

resort and exhaust, and in doing this he was bound to exercise the utmost good faith towards the sureties, doing no act which would impair the rights of either. Whether the agreement entered into between plaintiff and S. without the knowledge of Rea in regard to the purchase of the farm is a defense to the whole cause of action need not be considered, as defendant has not appealed.

Plaintiff insists that the evidence is insufficient to justify the finding of the referee that plaintiff agreed not to sue S. in consideration that he would purchase the farm and convey it to plaintiff. The only witnesses upon this question are plaintiff and I. T. S., who contradict each other. The subsequent transactions between the Standings and plaintiff in respect to the farm corroborate the evidence of S., and we think the finding should not be disturbed.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

#### LIMITATIONS. HUSBAND AND WIFE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Peter Groth, *applt.*, v. Thomas J. Washburn, *respt.*

Decided Jan. 9, 1885.

An action by a husband to recover damages for the loss of services of his wife, caused by a personal injury to her, inflicted through carelessness on the part of defendant, is not an action to recover for a personal injury, but is one to recover damages for an injury to property and is not barred by the statute of limitations until the expiration of six years.

Appeal from judgment upon the dismissal of a complaint and verdict directed by the Court, and from an order denying motion for new trial.

This action was brought to recover damages sustained by the plaintiff in consequence of injuries inflicted upon his wife through the carelessness of defendant's servants, such damages arising from the loss of services of his wife, moneys expended for necessary medical aid and attendance upon her during her illness, and for expenditures in the employment of one or more persons to do the service which she did for him. The action was not commenced until the expiration of more than three years from the time plaintiff's wife received the injuries which formed the basis of his demand; and, upon the trial, such fact being conceded and the statute of limitations having been set up as a defence, the Court dismissed the complaint and directed a verdict for the defendant upon the ground that the action was controlled by § 383 of the Code of Civ. Pro. and should have been brought within three years.

*J. H. Whittlegge*, for *applt.*

*Thornton, Earle & Kiendl*, for *respt.*

*Held*, That this was not an action to recover for a personal injury. That a personal injury was stated as an element only of plaintiff's case, and by which damages resulted to which plaintiff was subjected. That he was not to be compensated in this action for the personal suffering of his wife, or for any loss occasioned to her by

diminution of her capacity in any respect, or any disability created by the effect of the injury sustained upon her health, which would necessarily enter into an award of damages for the personal injury contemplated by the Code in §§ 383 and 3343.

That in this action plaintiff sought to recover for the result of an injury to his rights, interests, and property, 19 Hun, 342; 3 Den., 369; 25 How., 385; 19 N. Y., 464; 75 N. Y., 192; 24 Hun, 620, and that the action was controlled, therefore, by § 382 of the Code of Civ. Pro., prescribing six years as the time within which such an action must be commenced.

Judgment reversed and new trial granted.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concur.

### HOMICIDE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People, *respts.*, v. James H. Riley, *applt.*

Decided Dec., 1884.

S., a woman living alone, was found in her house mortally wounded by a fracture of the skull produced by a blunt instrument. The object of the murder was plunder. In the kitchen was found a pie plate and crumbs of bread on the table. The defendant was shown to have lived near the deceased. He was arrested in a distant town for which he stated that he had set out on the day before the killing, while the truth was that he had left deceased's town about three in the morning of the day on which she was found dead. He admitted he had been in the house and had eaten bread and pie on the day before the body was discovered. His boot exact-

ly fitted a frozen track near the part of the house where entrance was effected and he was shown to have been in possession of an ax about the time of the murder and thereafter, in spite of his denial. His story of his whereabouts on the evening of the day before the body was found was shown to be false and he was found in virtual possession of a tax receipt of the deceased. *Held*, That the facts warranted the verdict of murder in the second degree.

The guilt of a defendant must be established beyond *reasonable* doubt, not beyond a *possible* doubt.

Appeal from judgment on conviction of murder in the second degree, for the killing of one Mrs. S.

Five o'clock on March 27, 1883, Mrs. S. was seen outside and near her house in her usual health. On the next day, about three o'clock P. M., as she did not appear the daughters of a neighbor entered the house by the back way, which was found unfastened, and passing into the bed room found Mrs. S. wounded unto death by a blow on the head which had fractured the skull and had been produced by a heavy blunt instrument. It was evident that the premises had been entered by one acquainted with the deceased for the purpose of plunder. A pane removed from the window had permitted the fastening of the window to be reached. In the kitchen was found a chair placed at the table and on the table a pie plate and some crumbs of bread. The bureau drawers and drawers of the secretary had been opened, and though it did not appear that any money had been taken, yet it did appear that some money was found on a high shelf



in the pantry which had not been discovered by the murderer. Defendant had lived near the deceased and knew that she lived alone. He stated that he left the town on March 27, while the truth was that he left it about three o'clock in the morning of March 28. He was arrested in a town some distance away.

It appeared that he was in the vicinity just before the homicide and he admitted that he was at the deceased's house on the day before the body was found and ate pie and bread there. The story that he told of his whereabouts on that evening was false in almost every particular. A boot taken from the foot of the defendant fitted exactly a mark left by the foot of some person in frozen mud close to the house and near the back door. When defendant after arrest sent for certain articles and papers which he had hidden away there was found among them a tax receipt of the murdered woman, containing certain uncanceled postage stamps. The wound must have been inflicted with some blunt instrument like an ax, hammer or club, and defendant was shown to have left a neighboring house in possession of an ax on the day in question, though he denied that such was the case.

*Calvin Frost*, for applt.

*F. B. Barnum*, for respts.

*Held*, That the facts warranted the verdict. Juries are not to deal with possibilities in such cases. Where a case depends upon circumstantial evidence and in most other

cases a jury could not find that it was not possible for some one besides the prisoner to have committed the offence; a jury is never required to find that it was impossible for another to have committed the crime before they can convict a prisoner on trial; or, in other words, to find it is impossible for the prisoner to be innocent. Such a degree of certainty is rarely obtainable in the administration of justice. It is sufficient if all the material circumstances point to guilt and that they are inexplicable upon the theory of innocence. The guilt must be established beyond a reasonable doubt, not beyond a possible doubt. 86 N. Y., 646.

Conviction and judgment affirmed.

Opinion by *Pratt, J.*; *Barnard, P. J.*, and *Dykman, J.*, concur.

## MORTGAGE. PRIORITY. ESTOPPEL.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*Ira Seymour, respt.*, v. *Alexander McKinstry, Jr.*, et al., impl'd, appls.

Decided Jan., 1885.

A party claiming the benefit of the position of a purchaser in good faith and for a valuable consideration is bound to allege and prove that fact.

Plaintiff sold certain premises to one S. under agreement by which he was to be paid the proceeds of a \$5,000 mortgage to be given on the premises, and a second mortgage of \$3,000 should be given to his wife. McK., with knowledge of this arrangement, took a \$5,000 mortgage, as-

signed it and paid part of the proceeds to S., retaining the balance to apply to claims against S. Plaintiff refused to receive the check for the part offered, demanded the whole \$5,000 of McK., which was refused, and afterwards plaintiff drew the money on the check. In an action to declare the balance a prior lien on the premises, *Held*, That plaintiff was not estopped; that neither the receipt of the check by plaintiff, under the circumstances, nor the receipt of the second mortgage by his wife was a ratification of the transaction.

Appeal from judgment in favor of plaintiff, entered on decision at Special Term.

Plaintiff sold certain real estate to one S. August 27, 1872, for \$9,100, of which \$1,100 was paid down; \$5,000 was to be raised on a first mortgage to be given to the Equitable Life Ins. Co. and the amount paid to plaintiff, and \$3,000 was to be secured to plaintiff's wife by a second mortgage. The Ins. Co. refused to make the loan. Sept. 23, 1872, the grantee and his wife executed and delivered a mortgage for \$5,000 to defendant McKinstry, who was informed of the arrangement between plaintiff and S. and had full knowledge of plaintiff's rights, which was recorded the same day. Sept. 26, 1872, McKinstry assigned the mortgage to defendant Sabey, the assignment being recorded Sept. 28, 1872, and on the latter day Sabey gave McKinstry two checks amounting to \$5,000. Sept. 30, 1872, McKinstry gave S., the mortgagor, his check for \$2,100.37 and applied the remainder on notes and judgments against S. The check given to S. was endorsed by him and delivered to plaintiff, who at first refused to receive it and demanded the whole

\$5,000 of McKinstry, who refused to pay. The \$3,000 mortgage was executed and delivered to plaintiff's wife. Afterwards plaintiff drew the money on the check and brought this action to have the balance of \$2,899.63 declared an equitable mortgage on the premises prior in lien to defendant's mortgage.

The Special Term found upon conflicting evidence that defendant Sabey has not shown that he, when he took the assignment, did not have notice of plaintiff's equitable rights, or of the facts from which they arise.

*Louis Marshall*, for applt.

*Isaac D. Garfield*, for respt.

*Held*, That plaintiff, as between himself and his grantee, had an equitable lien on the premises for the unpaid purchase price, and as McKinstry had notice of the arrangement between plaintiff and the grantee and full knowledge of plaintiff's rights, the equitable lien continued as against McK., and was prior to the mortgage taken by him while it remained in his hands. A mortgagee and an assignee of a mortgage is a "purchaser" within the recording act, 1 R. S. 762, § 8, but the recording act protects only subsequent purchasers in good faith and for a valuable consideration. 1 R. S. 756. McKinstry, the mortgagee, was not a purchaser in good faith. Sabey, the assignee, seeking the benefit of the position of a purchaser in good faith and for a valuable consideration was bound to allege and prove that fact. 3 Johns. Ch., 34; 7 Id., 65; Hopk., 48, aff. 8

Cow., 361; 49 N. Y., 286, 298; Van Santv. Pldgs, (Moak's Ed.) 394, 564; Pom. Eq. Jur., § 785.

The evidence bearing upon this question was conflicting, the witnesses were before the court, which has passed upon their credibility, and the finding cannot be disturbed. The circumstances of the transaction between McKinstry and Sabey do not support the evidence of Sabey upon the question of good faith. Under the finding of fact, Sabey, the assignee, stands in the shoes of McKinstry, the mortgagee, and acquired no equities or rights not possessed by his assignor.

*Also held*, That there is no element of estoppel. It is true plaintiff conveyed the title to the mortgaged premises to the mortgagor; but McKinstry, the mortgagee, was fully advised of plaintiff's equitable lien before the mortgage was taken or any part of its consideration advanced. The acceptance of the check was not a ratification of the mortgage. When it was taken plaintiff distinctly claimed from McKinstry the remainder of the consideration of the mortgage. It was taken because he could then get no more, and evidently under protest. McKinstry could not have understood that plaintiff acquiesced in the transaction and received the check as a payment and discharge of his lien. The acceptance and payment of the check reduced the equitable lien by its amount.

The acceptance by the wife of plaintiff of the second mortgage is not a ratification of the transaction and does not affect the priority of

plaintiff's lien. The wife got precisely what it was agreed she was to have, a \$3,000 mortgage subject to a \$5,000 mortgage. In this plaintiff had no legal interest and the wife had none in plaintiff's equitable lien.

*Also held*, that the finding, that plaintiff did not acquiesce in the application by McKinstry of \$2,899.63 upon claims against the mortgagor, is abundantly supported by the evidence and cannot be disturbed.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, concurs; *Boardman, J.*, not sitting.

#### SUPPLEMENTARY PROCEEDINGS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Martin Mason, *respt.*, v. Henry Hackett, *applt.*

Decided Jan., 1885.

The provisions of the Code of Civ. Proc. relative to proceedings subsequent to execution are not applicable where the judgment on which execution issued was recovered in the Municipal Court of the City of Rochester for less than \$25 damages.

Appeal from County Court order denying appellant's motion to set aside proceedings subsequent to execution.

The appeal presents the question whether the provisions of the Code of Civil Procedure relative to proceedings subsequent to execution are applicable to a case where the judgment on which the execution issued was recovered in the Muni-

cial Court of the City of Rochester for less than twenty-five dollars damages.

*Henry J. Sullivan*, for applt.

*Chamberlin & French*, for respt.

*Held*, That the question must be answered in the negative. Transcripts of judgments rendered in the Municipal Court may be filed in the County Clerk's office and if the recovery is for less than \$25 exclusive of costs the judgment is not a lien on real estate. Laws of 1880, Ch., 14, § 6. See Code Civ. Proc., §§ 3043, 3226.

The execution was in the sheriff's hands at the time these proceedings were instituted, and as the judgment was not a lien on the debtor's real estate there was no execution against property within the meaning of § 2436. The word "property" as used in this section includes real and personal property. § 3343. See 14, East, 370; 17 Johns., 284; Bouv. L. Dict., "Property." The amendment to § 2458, in 1881, was not intended to change the other provisions of the act that the judgment must be a lien on real estate. The amendment was doubtless made to authorize proceedings after execution on judgments in courts of record where the same was a lien on real estate and there was no recovery for damages, but the judgment was rendered for costs. It was not the intention of the legislature to devote the debtor's real property to payment of judgments unless they by the same statutes became a lien thereon. The statutes relating to supplementary proceedings and to the sale of real and personal pro-

perty on execution are in *pari materia* and must be considered together. 24 Hun, 520; 15 id., 190.

Order reversed and motion granted, with \$10 costs and disbursements.

Opinion by *Barker, J.*; *Bradley* and *Lewis, JJ.*, concur; *Haight, J.*, concurs in result.

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#### ASSESSMENTS. DAMAGES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

*James H. Haight v. The Village  
of Peekskill.*

Decided Dec., 1884.

Commissioners were appointed under Chap. 113, Laws of 1883, to ascertain the damages caused by change of grade in a street in Peekskill. Section 2 of that act provided the provisions of the General Railroad Act relative to the appointment of commissioners, their power and duties, should be applicable to the appointment of and the power and duties of these said commissioners. The defendant answered and denied the petitioner's title and the injury, and these were the only questions put at issue. On this appeal from the order appointing the commissioners and their award, *Held*, That the objection that, as the petition does not state that an effort had been made to settle or fix the amount of damages, the appointment was void by § 18 of the Railroad Act was frivolous, and even if it had been valid if made on the return of the petition it could not, as here, be raised for the first time on appeal; that the presumption is that the commissioners followed the correct rule of damages in fixing their award; that the question, "Without taking into account any benefits supposed to be derived from raising the grade, would it then be any injury to the property?" was properly allowed.

Appeal from order appointing commissioners under Chap. 113, Laws of 1883, to ascertain the amount of damages sustained by the petitioners by reason of the change of grade in a street in Peekskill, and also from the order confirming the award of such commissioners. By § 2 of this act it is provided that the provisions of the General Railroad Act relative to the appointment of commissioners, their powers and duties, shall be applicable to the appointment of and the powers and duties of commissioners appointed in pursuance of the provisions hereof. Under the railroad act, § 13, a company shall have the right to acquire title to land as prescribed in that act only in case it is unable to agree for its purchase, and under § 14 it must show in its petition that it has not been able to acquire title thereto and the reason of such inability. The defendant answered and denied the petitioners' title and the injury. This was the only issue raised.

*Held*, That the objection was frivolous. That even if it could be regarded as valid if made at the return of the petition it could not in any event be raised for the first time on appeal.

That the plain answer to the contention that the commissioners erred in the rule of damages adopted by them is that, inasmuch as the appellant has not shown that they adopted the wrong rule or made any error in the assessment, the presumption is that the correct rule was followed.

That there was no error in the

question put to the witnesses, "Without taking into account any benefits supposed to be derived from raising the grade, would it then be an injury to the property?" inasmuch as it was put in order to ascertain the basis upon which the opinions of the witnesses were formed.

Order affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, concurs.

#### RELIGIOUS CORPORATIONS. SALE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

*In re St. George's M. E. Church.*

Decided Dec., 1884.

The trustees of St. George's M. E. Church, a corporation organized pursuant to Chap. 60, Laws of 1813, procured an order on petition authorizing them to sell the church property. Before the deed was delivered certain members of the congregation, after serving notice of objection and protest to the trustees on the grounds that no legal order was made; that the consent of the majority of the corporation and congregation had not been obtained and the question of sale had not been submitted to those bodies, obtained an order to show cause why the sale should not be vacated and the trustees restrained until the questions were submitted to the corporation and congregation. On an appeal from the order refusing to vacate and stay, *Held*, That the trustees held the property in the same sense as directors of civil corporations; that the method adopted was in accordance with the rules of the church; that the meeting and vote insisted upon were not essential.

Appeal from order of Special Term, denying motion to set aside an order of Special Term authorizing the respondents as trustees

of St. George's Church to sell certain real estate belonging to the corporation. This order for the sale was granted *ex parte* on the application of a majority of the trustees by petition. Thereafter two of the members of the congregation of said church and corporation signed and caused to be served upon the trustees of said church a notice of protest against the sale because there had been no legal order therefor; the consent of a majority of the congregation and corporation had not been obtained, and the question of sale had not been submitted to the said bodies. They then obtained the order to show cause, upon the argument of which the order from which this appeal is taken was granted.

*Charles C. Suffern*, for applts.

*Grant B. Taylor*, for respts.

*Held*, That the motion was properly denied.

By statute the duty of administering the temporalities of the church and applying the revenues for the benefit of the corporation was imposed upon the trustees. They held the property for the corporation in the same sense as the directors of civil corporations. The methods of procedure in discharging their duties are prescribed by the rules and usages of the church. Chap. 176, Laws 1876. The method adopted in this proceeding was in accordance with the rules of the church. It is not shown that there is any rule or usage requiring a meeting of the corporation and a vote of approval in order to authorize the trustees

to make an application to sell. Such a meeting and vote were not essential. The trustees had ample power without any such authority. 46 N. Y., 131; 73 N. Y., 82; 13 Abb. Pr., 424; 23 How. Pr., 285.

Neither does it appear that there had been any meeting to take the sense of the corporation in opposition to a sale. No basis is shown for the statement in one affidavit that a majority of the church are opposed to the sale, while the other affidavit does not state the source of the information or ground of belief on which it is made. Therefore, and inasmuch as it appears that the application was made in good faith, and also for the welfare of the church, the propriety of the sale under the circumstances cannot be questioned.

Order affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

## MARINE INSURANCE.

### N. Y. COURT OF APPEALS.

*Delahunt et al., respts., v. The Ætna Ins. Co. of Hartford, applt.*

Decided Jan. 20, 1885.

A clause in a policy of insurance on a canal boat, providing for a termination of the risk if the voyage cannot be finished the same season in consequence of ice or the closing of navigation, does not become operative by reason of a temporary stoppage of the boat by ice and closing of navigation, which was afterwards reopened so that the voyage was resumed.

The persons named in the policy as the assured, being in possession of the same, are the proper parties in interest and entitled to maintain the action.

Where an open policy contained a clause of forfeiture upon assignment and loss be-

fore notice to the company, but the certificates issued thereunder were made payable to the assured or order, *Held*, That an assignment of the certificate, without notice, did not come within the provision.

*Affirming* S. C. 14 W. Dig., 479.

This was an action upon a policy of marine insurance. Plaintiffs were common carriers and defendant issued to them the policy in question upon the cargo of a canal boat during a voyage from Buffalo to New York. The policy provided, among other things, that: "If, in consequence of ice or the closing of navigation the said voyage cannot be finished the same season, the risk to end at the place and at the time the voyage is stopped, three days being given to discharge." During the latter part of November the boat was frozen in three or four miles west of Schenectady and the captain and crew left her. On the 25th of that month the Canal Commissioners by resolution determined that the canal should be closed December 5th. On December 7th the State officers in charge opened the canal by letting in water and cutting a channel through the ice, and plaintiff's boat with others was towed by a tug to Troy and thence down the river to Albany, where it was "hitched on to a steamboat" to be taken to New York, but before starting and while lying at the dock she careened over and sank, the cause of her destruction being an injury received after she had escaped from any danger that might be occasioned by the ice. A motion was made for a non-suit, which was denied.

*James M. Humphrey*, for applt.  
*E. C. Sprague*, for respts.

*Held*, No error: that the risk had not terminated at the time of the loss; that defendant undertook to bear the perils not only of the canal but of the river, and in framing the condition in question must be deemed to have had in view such event as would prevent the boat from passing over either and not a temporary difficulty which could be overcome.

It was also urged as a ground for non-suit that plaintiffs did not own the policies and insurance upon which this action is brought at the time of its commencement. The terms of the policy require defendant to indemnify the persons whose names shall be indorsed thereon as "owner, advancer, or common carrier, on goods," etc., on boats "from place to place as indorsed" on the policy or on a book kept for that purpose, and declares that "this policy may be assigned upon giving defendant notice." The insurance was by entries in a book accompanying an open policy. When an entry was made a certificate was delivered to the insured making the loss, if any, payable to plaintiffs. Two of these certificates were assigned to the owners of the cargo insured to secure their interest, and the other with a bill of lading to a bank as collateral security for a draft discounted for plaintiffs. Additional security was secured by one of the owners and collected by him after the loss. Advances were made by plaintiffs to the captain of the boat on account of freight and for ex-

penses incurred in getting the property through. By an arrangement between the owners and plaintiffs before this action was commenced plaintiffs became entitled to the certificates and they were thereafter returned to them and they produced them on the trial.

*Held*, That so far as the freight and advances are concerned plaintiffs are the parties in interest, and as to the residue they were at least the proper parties plaintiff, 47 N. Y., 345, even if they were to be regarded only as equitable trustees for the other parties for the amount unpaid.

It was claimed that as the policy was assigned before loss without notice to defendant it was void.

*Held*, Untenable; that plaintiffs continued to be owners of the policy subject to the interest acquired by the assignees of the certificates. So far as those instruments affected the title defendant was not entitled to notice, as by the form in which they were issued the loss was made payable to such persons as the insured should appoint.

Judgment of General Term, affirming judgment on verdict for plaintiffs, affirmed.

Opinion by *Danforth, J.* All concur, except *Ruger, Ch. J.*, and *Rapallo, J.*, dissenting.

#### HOMICIDE. JURY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People, *respts.*, v. Chas. H. Rugg, *applt.*

Decided Dec., 1884.

Sections 46 and 226 *et seq.* of the Code of Crim. Proc. referring to the ordering of a Grand Jury, are intended as parts of a system of procedure and are entirely consistent and harmonious.

It is not error for the Court on a trial for homicide to rule out the following preliminary question put to a proposed juror: "Suppose that when the prosecution closes its case the proofs at that point satisfy you that M. had been put to death by the defendant, would you still believe him innocent of the murder, or would you then and thereafter believe him to be guilty of it?"

Confessions of a defendant voluntarily made are admissible.

It is not error to exclude the sworn statement of a witness made before a justice of the peace upon an inquiry into the cause of the death of the deceased, or to refuse to permit counsel to examine him on that statement.

In charging the jury, it is competent for a judge to assume a fact for the purpose of illustrating a point or to state what is conceded, claimed or denied by counsel during the progress of a trial.

Any objectionable statement concerning the facts in issue by a judge in his charge is fully cured by a plain statement thereafter that the jury are left as the sole judges of all the facts or equivalent words.

It is not error in the judge to refuse to charge "If the jury are satisfied from the evidence that the larceny of the watch, etc., was committed after the murder there can be no conviction of murder in the first degree unless there is in addition affirmative proof on the part of the people that the murder was premeditated and also deliberate, and that the people must prove both premeditation and deliberation as clearly and as much to the satisfaction of the jury as they must prove the killing itself."

The jury in rendering the verdict "guilty" did not add the words "of murder in the first degree." *Held*, No error; especially as they had been charged to specify any other degree, if found, in their verdict.

Appeal from judgment of conviction of murder in the first degree.



*John F. Quarles*, for applt.

*John Fleming*, dist. atty., for respts.

*Held*, That, inasmuch as the record shows that the county judge had designated the times and places at which Courts of Sessions should be held in his county and the terms at which a grand jury would be required to attend in accordance with § 45, Code Crim. Proc., and that the order had been duly published, there is no merit in the contentions that it did not appear that the Grand Jury, finding the indictment, had been specially ordered by the Court or the Board of Supervisors as required by § 226, and that § 227 of said code was violated, and hence there was no authority for choosing such Grand Jury. That § 226 was intended to provide for the drawing of a grand jury in cases where the county judge has not acted under § 46, and these various sections are intended as parts of a system of procedure and are entirely consistent and harmonious.

Whether, as in this case, a statement in the affidavit of defendant's attorney that after search no order as required by § 226, Code Crim. Proc., was found in the county clerk's office, was sufficient, in the absence of any suggestion of fraud, or of any statement of the extent and diligence of the search, to overcome the presumption that public officers performed their statutory duty in choosing the grand jury, *quære?*

*Also held*, That the preliminary question to the proposed juror: "Suppose, that when the prosecu-

tion closes its case the proofs at that point satisfy you that the Maybees had been put to death by defendant, would you still believe him innocent of the murder or would you then and thereafter believe him to be guilty of it?" was properly ruled out on objection, inasmuch as it was purely speculative and irrelevant.

*Also held*, That, inasmuch as it appeared that the confessions of defendant were voluntary they were properly admitted. 80 N. Y., 515; 27 Hun, 473.

*Also held*, That it was not error to exclude the sworn statement of the witness Tappan before a justice of the peace upon inquiry into the cause of death of Ann Maybee or to refuse to permit counsel to examine him on that statement. Tappan was called by defendant and fully examined as to the murder, and what he had said on a former occasion was immaterial. Defendant could neither impeach him nor fortify him by his previous declarations. Whart. Crim. Ev., 225-262; 74 N. Y., 277; 85 N. Y., 89.

In the course of the charge the judge said, under exception, "It is the watch of Mrs. Maybee and it was taken away in all probability some time upon the night in question."

*Held*, No error, for it is competent for a judge to assume a fact for the purpose of illustrating a point or to state what is conceded, claimed or denied by counsel during the progress of a trial, and at the time in question the judge was calling the attention of the jury to

facts that he regarded or supposed to be conceded by defendant.

During the charge the judge also said, under exception, "Now, the theory of the prosecution is that the man who stole that property committed the crime of murdering Ann Maybee. It is the corner stone of their whole case, and the circumstances are such as to warrant you in coming to that conclusion."

*Held*, That if there were any errors, especially in the last clause, they were entirely cured by the statement of the judge to the jury after his attention had been called to these words, at the close of his charge: "I do not indicate to the jury any fact as conceded in the case unless they are satisfied on the testimony that it is true," and again, "I leave everything to the jury to be determined as a fact."

Defendant's counsel asked the Court to charge "If the jury are satisfied from the evidence that the larceny of the watch, etc., was committed after the murder of Maybee, there can be no conviction of murder in the first degree unless there is in addition affirmative proof on the part of the people that the murder was premeditated and also deliberate, and that the people must prove both premeditation and deliberation as clearly and as much to the satisfaction of the jury as they must prove the killing itself," which request was refused.

*Held*, No error, inasmuch as it did not necessarily follow that in case the property was taken after the homicide that the jury could

not find that the killing was done while committing a felony.

*Also held*, That there is no error in the fact that the jury failed to state that they found defendant guilty of *murder in the first degree*, especially in view of the fact that the Court had charged them that if they found any other degree they must so state in their verdict.

Judgment affirmed.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

[Judgment affirmed by Court of Appeals, March 27, 1885. Ed.]

#### DEEDS. DELIVERY.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

William H. Nearpass, *respt.*, v. Franklin Newman, Jr., et al., *appls.*

Decided Dec., 1884.

The courts will not aid a party to set aside an executed agreement on the ground of illegal consideration. As to all such contracts the courts will not compel either party to execute, or set aside the agreement when executed.

A husband agreed to quit-claim certain property to a trustee and also to execute certain conveyances of other property to him, such deeds to be placed in *escrow* with said trustee and to be delivered when the wife should perform certain covenants to the effect that she would not oppose proceedings for a divorce. If the wife failed in her covenant, there was to be a return. The deeds were executed, acknowledged, recorded and by admission on trial duly delivered to said trustee. *Held*, That, assuming that the consideration was illegal, if the deed was delivered under the agreement neither the husband nor those in his shoes could assail the same; that the admission must be taken as acknowledging a delivery pursuant to and in conformity with the

terms of agreement; that the recording thereof was inconsistent with the theory of *escrow* or of its return, and that these facts coupled with the production of the deed by the trustee are sufficient to prove execution and delivery under the contract in the absence of any evidence to the contrary as to whether the agreement was carried out.

Appeal from judgment in favor of plaintiff. In 1864 one F. and H. his wife and one Neefus entered into an agreement whereby F. conveyed to Neefus certain realty in trust to sell the same and invest the proceeds and to pay over the income to H. during her life for the support of herself and her children. In 1865 another agreement was executed by the same parties, which recited that the husband and wife being satisfied that it were better that they should be wholly divorced and that as F. desired to make further provision for his wife, he in consideration of certain covenants of H. agreed to quit-claim to said Neefus all his right, title and interest in said realty and to execute conveyances of certain other property to said trustee, such quit-claim deed and conveyances to be placed *in escrow* with Neefus and delivered when the said wife should perform her said covenants.

These covenants were that she would not hinder her husband in obtaining an absolute divorce in any State where he might apply, and that if she were not charged with adultery or required to swear to any false statements she would join in any petition for such divorce or accept service of process. Later in the same month in 1865

a quit-claim deed to Neefus was executed by the husband, and on the same day the deed was duly acknowledged and recorded, while this case contains an admission that "the same was duly delivered to Neefus." Neefus subsequently sold said lands and invested a part of the proceeds in bonds and a part in certain realty in Jefferson street, Brooklyn.

In 1872 Neefus resigned as trustee and F., Jr., was appointed in his place, and thereupon Neefus delivered to him the bonds and conveyed to him the realty. The wife died in 1882. After her death the husband, claiming that the property reverted to him, made an assignment thereof to plaintiff, who brought this action on the refusal of the trustee to deliver up said property. The Special Term held that the same reverted to F. on the death of his wife and directed an accounting and thereafter judgment for plaintiff.

*Hubbard & Rushmore and John D. Pray*, for applts.

*E. Sprout*, for respts.

*Held*, That if it were not for the quit-claim deed in April, 1865, the Special Term would be right in its decision. That the only estate created by the trust having been one for the life of the wife the reversion remained in the grantor, and upon her death the trust fund reverted to the husband. 1 R. S., Edmonds Ed., 679, § 62.

That if the deed was a valid instrument duly delivered it divested F. of any estate in the property. This deed cannot be attacked by plaintiff on account of illegality of

consideration, as this plaintiff stands in F.'s shoes. Any discussion as to whether the consideration was illegal is not pertinent, as the case rests on the principle that the courts will not aid a party to set aside an executed agreement on the ground of illegal consideration.

As to all such contracts the courts will not compel either party to execute nor set aside the agreement when executed. Assuming then that the consideration was illegal, if the deed was actually delivered pursuant to that agreement F. could not assail it, nor of course could this plaintiff.

The case contains no evidence as to whether the agreement of April, 1865, was executed save what can be inferred from the papers and the admission noted, which I interpret as meaning a delivery pursuant to and in conformity to the terms of agreement. Under this agreement the deed was to be delivered to Neefus *in escrow*, and in case the wife failed in her covenants it was "to be returned to the husband." He outlived his wife and the deed was not returned. The recording thereof was inconsistent with its being left *in escrow* or with its return. After being recorded a return of the deed would not have transferred the title to F., but a conveyance would have been necessary. The fact of recording, coupled with the fact of the production of the deed on the trial by the trustee together with the admission noted, prove execution and delivery under the contract. F. was divested of his re-

version, and no interest, therefore, passed by his deed to plaintiff.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs.

## NEGLIGENCE. CONTRACTORS.

### N. Y. COURT OF APPEALS.

Nolan, *respt.*, v. King, *applt.*

Decided Jan. 20, 1885.

It is the duty of one who, in building a vault, is compelled to remove the sidewalk in a populous city and build a bridge over it, to so construct the bridge as to involve no peril to those passing over it, exercising due care; but he cannot be required to so construct it that it shall equal the sidewalk in safety and convenience, or that passers may cross with as little heed and care as upon the completed walk.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant. It appeared that defendant was the contractor for the erection of a building in the city of New York. Included in his contract was the building of a vault under the sidewalk. Having obtained due authority from the municipal authorities, he removed the sidewalk and made the necessary excavation and built a bridge over it along the front of the building. This bridge was about six feet wide, and, in order to facilitate the work of construction, was raised about two feet above the sidewalk with two steps at either end. Plaintiff in descending the steps at one end slipped and fell and received the injuries complained of. The court charged the jury that it was de-

fendant's duty "to have the bridge constructed in such a manner that plaintiff would not be subjected to any more personal risk than if the sidewalk had been there instead of the bridge."

*Joseph Auerbach*, for applt.

*John O. Mott*, for respt.

*Held*, Error; that it was defendant's duty to so construct the bridge as to involve no peril to those passing over it and exercising the ordinary care appropriate to the situation. He could not be required to so construct the bridge that it shall equal in safety and convenience the sidewalk removed, or that passengers may cross with as little heed and care as upon the completed pavement. 90 N. Y., 679; 91 id., 143.

*Clifford v. Dam*, 81 N. Y., 56; *McGuire v. Spence*, 91 id., 303; *Wasmer v. D., L. & W. RR. Co.*, 80 id., 212; *Irvine v. Wood*, 51 id., 224, distinguished.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Finch, J.* All concur, except *Danforth, J.*, dissenting.

## LANDLORD AND TENANT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*George McVie, respt.*, v. *Henry G. McNaughton, applt.*

Decided Dec., 1884.

Defendant let a house to H. until May 1, 1883. In May, 1882, H. sublet a room on the ground floor to plaintiff. On April 1,

1883, H. surrendered the lease to defendant, but plaintiff continued in possession of his room. Defendant in April, 1883, employed G. to put a new roof on the building. This was not done to stay waste, but to improve the estate. Plaintiff was not consulted, but his possession was not interfered with. After the old roof was taken off G. notified plaintiff to protect his goods, as the new roof could not be put on that day. Plaintiff promised to do so. A heavy rain came on and plaintiff was damaged. *Held*, That defendant was liable.

Appeal from County Court judgment in favor of plaintiff, rendered on the facts stated in the head note.

*Thompson & Andrews*, for applt.

*C. B. King*, for respt.

*Held*, That the judgment must be affirmed. Defendant as owner of the building and in possession of all of it except the part occupied by plaintiff owed him the duty so to use and repair it as not to injure him. Plaintiff's right to immunity from injury was complete until May 1, 1883. Defendant had not plaintiff's permission to repair and it was of no advantage to him. The repairs were made to benefit an incoming tenant. The negligence of the contractor, if there was any, is not a defense to defendant. The methods of the contractor might delay the repairs, but the wrong was the act of defendant in exposing plaintiff to injury. Defendant assumed dominion over the whole building, when he was entitled to dominion over only a part.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Fish, J.* concur.

## TAXES. PARTITION.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

Abraham Odell v. Eugene Odell.

Decided Dec., 1884.

After the purchaser on a sale in partition paid the purchase money and received the deed he presented a bill for the taxes of 1883 to the referee and asked its payment, which was refused because the land was assessed to "The estate of Jacob D. Odell." The assessment was made under the charter of Yonkers, which provided, "For the valid assessment of any land it shall be sufficient to give the name of the owner when known, the lot number if any on any designated map, the size thereof as near as can be ascertained and the assessed value. An error in the name of the owner shall not invalidate the assessment." *Held*, That the tax was a lien on the premises and should have been paid and discharged by the referee under § 1676 of the Code of Civil Procedure. That it was not the duty of the referee to pay the same out of the purchase money before compelling the purchaser to take title.

Appeal from order of Special Term.

Suit for the partition of certain lands in the city of Yonkers. The premises were sold by the referee to the appellant Powers, who paid the purchase money and received a deed. He presented a bill for the taxes of 1883 besides interest and commissions levied upon said premises before the sale and asked that the same be paid. The referee declined because the land was assessed to the "Estate of Jacob D. Odell," but retained the money and asked the Court at Special Term for instructions. The Court decided that the taxes were not a lien on the real estate, and ordered distribution of the money.

*John A. Mapes*, for applt.

*John H. Clapp*, for plff.

*Samuel Riker*, for deft.

*Held*, That if the tax was a lien on the premises it was not the duty of the referee under § 1676 of the Code of Civil Proc. to pay the same out of the purchase money before compelling the purchaser to take title.

That as there was no assessment to or against any person as owner, neither were they designated as upon lands of non-resident owners, under the Revised Statutes the assessment would have been void. 86 N. Y., 339.

But this assessment was made under the charter of Yonkers, which provides: "For the valid assessment of any land it shall be sufficient to give the name of the owner *when known*, the lot number if any on any designated map, the size thereof as nearly as can be ascertained and the assessed value. An error in the name of the owner shall not invalidate the assessment." It seems to be the purpose of the charter to look solely to the realty itself for the enforcement of the proper share of the taxes. In this case the assessors gave what information they had by naming the man whose long life estate had just ended by his death. This answered every purpose of identification.

There was simply an "error in the name of the owner," which the act expressly provides shall not invalidate the assessment.

This tax was a lien on the premises and should have been paid and

discharged by the referee under § 1676 of the Code.

Order reversed, and referee directed to pay said taxes. No costs of appeal.

Opinion by *Pratt, J.*; *Barnard, P.J.*, concurs; *Dykman, J.*, not sitting.

### FRAUDULENT CONVEYANCE. MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Lorenzo Smith, receiver, *applt.*,  
v. Solomon Shaul et al., *respts.*

Decided Dec., 1884.

S., being indebted to B. and others, with intent to defraud them, mortgaged his land to his daughter, a part of the consideration being the face and several years' interest on his note given her on her marriage. This mortgage was assigned, through a third person, to her husband, who foreclosed it, and with knowledge of all the facts bought on the sale, pending this action brought by plaintiff, as receiver appointed under B.'s judgment against S., to set aside the foreclosure judgment. *Held*, That the sale was of no effect as to plaintiff's rights, as the husband was not an innocent purchaser and paid no new consideration, he applying his bid on former valid mortgage liens which he held on the property and which were prior to the fraudulent mortgage, and upon the mortgage foreclosed; that as to existing creditors the mortgage was void to the amount of S.'s promissory note and interest.

*Query*, Whether, if the mortgage to the daughter was given and received with intent to hinder creditors, it was not wholly void, although part of it was for money actually loaned the father by the daughter?

The complaint alleged that defendant Shaul was indebted to one

Baxter and also to others; that thereafter he mortgaged his real estate to his daughter, the defendant Crannell, for \$5,000, with the intent upon her and upon his part of defrauding his creditors; that after this he conveyed his property to the defendants, his sons, to defraud his creditors and without consideration; that defendant Crannell assigned to her husband Wm. W. the above mortgage, he well knowing its fraudulent purpose; that Wm. W. foreclosed this mortgage and had advertised the property for sale; that Baxter had gotten judgment and under that plaintiff had been duly appointed receiver in sup. pro.; and plaintiff asked that the sale be stayed, his judgment be declared a lien and that the conveyance to the sons, the mortgage to the daughter and the judgment of foreclosure under it be declared void as to creditors. Pending the action the sale in foreclosure took place; the attorney for Wm. W. Crannell bought and he assigned his bid to Wm. W. On the trial it appeared that the conveyance to the sons was without consideration and that it reserved to the grantor his support for life. It also appeared that of the consideration of the \$5,000 mortgage, \$1,544 was for principal and interest on a \$1,000 note given by Shaul to Mrs. Crannell upon her marriage, and the rest of it was money loaned Shaul. On the sale Wm. W. Crannell's attorney bid \$6,974. There was evidence given of the truth of all the allegations of the complaint. The referee nonsuited plaintiff upon

the ground that the judgment of foreclosure had been executed and the complaint made no allegation against the sale and did not ask to set it aside.

*S. L. Mayham*, for applt.

*N. P. Hinman*, for resp't.

*Held*, Error. The conveyance by Shaul to his sons was void. 66 N. Y., 374. The mortgage to Mrs. Crannell was void as to existing creditors to the amount of the note, \$1,544. A promissory note of the giver being but an executory promise to pay, and not the payment itself, is not the subject of a gift. 3 N. Y., 112; 52 Id., 373. The assignment of the mortgage by the wife through a third party to her husband placed him, as to the excess of consideration, in the shoes of the assignor. The husband was not an innocent purchaser on the sale. It also appears that he held unquestioned mortgage liens on Shaul's property prior to the \$5,000, amounting to \$6,565. Hence, taking out the note, there was a deficiency on the foreclosure sale of \$2,953. There was no other evidence of the value of the premises. This deficiency is urged as a reason why relief should not be granted. It is said that the prior liens will consume the property. The referee has made no finding on this or any point in the case and we cannot assume this. And perhaps, if made to defraud creditors, it was void even though a part was for money actually loaned. 12 Hun, 308.

Plaintiff had the right in this action to assail the mortgage of \$5,000 and the foreclosure, for

neither he nor the creditor was a party to the other action: they had no standing to ask relief in that action. 37 N. Y., 523; 73 Id., 571. Wm. W. Crannell, when he bought or took an assignment of his attorney's bid, had actual knowledge of plaintiff's claims, and was besides apprised of the facts by service upon him of the complaint herein. So that the foreclosure made no change and it relieved the case of the embarrassment of the conveyance by Shaul to his sons. The simple question remains between plaintiff and Wm. W. Crannell whether plaintiff has made good his allegation that the \$5,000 mortgage was executed to defraud creditors. If he has, he may still pursue his remedy against the mortgagor's land.

We think that under the complaint plaintiff was entitled to a judgment (if the above facts had been found by the referee) declaring that the judgment of Baxter was a lien upon the mortgaged land, notwithstanding the foreclosure, subject to the prior valid mortgage liens of Wm. W. Crannell and subject to so much of the \$5,000 lien as should be found valid, and allowing him to pursue his remedy either by an execution or a receiver. 12 Hun, 306; 16 Id., 168.

Judgment reversed, referee discharged, new trial granted.

Opinion by *Landon, J.*; *Fish, J.*, concurs; *Learned, P.J.*, concurs in result.



## EXEMPTION.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

Charles L. Wilder, *respt.*, v.  
Joel Stewart, *applt.*

Decided Jan. 1885.

A householder cannot, by an executory agreement, estop himself from the right to claim the benefit of the statute of exemptions.

Even though a clause in a lease making the personal property to be put on the premises the property of the lessor as security for rent may give the lessor a right to hold exempt property therefor, the right is lost when he unites other claims with his claims for rent in the judgment.

Appeal from judgment in favor of plaintiff.

Action to recover for goods wrongfully taken and sold on execution. Defendant on August 26, 1881, recovered judgment against plaintiff before a justice of the peace for \$133, for rent of a farm, hay sold and delivered and money advanced to and expended for plaintiff. Execution was issued and levied, by direction of defendant, on a span of horses, harness, wagon, neck yoke, whiffletrees and a cow, and the same was sold thereunder. At the time of the levy, and at the sale, plaintiff forbade the taking and sale on the ground that the property was exempt. He was a householder and had a family for which he provided, and, by the undisputed evidence, the property was clearly exempt.

The lease to plaintiff contained the following covenant: "That all of the proceeds of said farm, and all the hay, grain, and general

proceeds of said farm, and all the personal property thereon and to be put thereon by Wilder, shall belong to and be the property of Stewart, who shall have the absolute title to the whole thereof as security for the payment of said rent and the faithful performance of the conditions of this lease," and under this covenant defendant claimed the right to take the property.

Plaintiff recovered a judgment for the value of the property taken.

*J. W. Shea*, for *applt.*

*D. A. King*, for *respt.*

*Held*, No error. A householder cannot, by an executory agreement, estop himself from the right to claim the benefit of the statute of exemptions. 22 N. Y., 249; Freeman on Executions, § 216. Whatever right defendant may have had under the lease to hold the property as against the statute of exemptions, it was lost when he united his claim for rent with other claims and entered a judgment upon them.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## TAXATION. EXECUTORS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

The People, *ex. rel.* Wm. H. Osgood et al., *ex'rs.*, v. The Commrs of Taxes and Assessments of the City and County of N. Y.

Decided Jan. 8, 1885.

The whole amount of a fund held by executors on deposit in trust companies under a decree of a Surrogate to await the

determination of contested claims against the estate which exceed the amount of the fund is subject to assessment and taxation.

Contested and disputed claims against an estate, are not just debts within the meaning of the statute entitling a person assessed as executor, etc., to have deducted the just debts due from him in his representative character.

Certiorari to review the decision of the Commissioners of Taxes and Assessments.

The relators were assessed for the year 1884 in the sum of \$650,000 for personal estate held by them as executors, etc. They made an application to the Commissioners of Taxes and Assessments for a correction of the said assessment and in support of such application they submitted an affidavit in which it was stated that they had duly accounted before the Surrogate of the County of New York, and upon such accounting a decree had been entered under which they had paid over the entire estate except \$484,268.21, which remained upon deposit in certain trust companies and banks, under a provision of said decree, reserved for the payment of disputed and other claims and the further expenses of administration, and it was further stated that the debts presented against the estate were contested and exceeded the said sum. Thereupon the Commissioners reduced the assessment to \$480,000, and subsequently the relators commenced these proceedings to review this action of the Commissioners.

*John M. Bowers*, for relator.

*Albert L. Cole*, for resp't.

*Held*, That the title to the reserved fund remained in the executors. That it was clearly subject to assessment and taxation unless exempted by statute. That the just debts which the relators owed in their respective capacity might be deducted, 2 R. S., 7th Ed., 99, § 10, but that disputed and contested claims were not just debts within the meaning of the law. That it must be assumed that they were properly contested, and it could not be presumed from any fact shown in the papers that they would be established and recovered. That such a contingency does not come within any of the exemptions of the statute, and that the fund was assessable and taxable.

Action of Commissioners affirmed.

Opinions by *Davis, P. J.*, and *Daniels, J.*

*Brady, J.*, wrote for a modification of the taxation by placing it upon the whole sum mentioned in case it should not be diminished by the payment of just debts out of it, and upon such sum as might remain after the payment of existing debts by due process of law, if any should be so ascertained to exist.

#### ATTORNEY.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Mary Woodbridge, applt.*, v. *Ira W. Cook et. al.*, *respts.*

Decided Dec., 1884.

There is no presumption that counsel have personal knowledge of the truth or falsity of affidavits presented by them in court.

In the absence of any evidence of such knowledge an action does not lie against an attorney for conspiring to procure the discharge of a judgment debtor, on the ground that the affidavit of service of the notice of the motion for such purpose on the creditor's attorney was false.

Appeal from judgment entered on dismissal of complaint at Circuit.

Action for damages. The complaint alleged that plaintiff had heretofore recovered a judgment against one Nelson, on which an execution was issued against the person, and that after various ineffectual attempts to procure Nelson's discharge, both under the provisions of the fourteen-day act and by writ of habeas corpus, the defendants, some of whom were the attorneys for said Nelson, conspired to procure the discharge of Nelson by taking proceedings under the fourteen-day act by filing an affidavit of one Riley that plaintiff's attorney had been duly served with notice of such application, which affidavit was false, and that thereby defendant procured the discharge of Nelson, no one appearing to oppose, whereby plaintiff was damaged. The answer was a general denial and that the said affidavit was true.

*Samuel Judson*, for applt.

*Theodore B. Gates*, for resp't.

*Held*, There is no presumption that counsel have knowledge of the truth or falsity of affidavits used by them in Court.

That therefore, inasmuch as it does not appear that any of the respondents knew of the falsity of Riley's affidavit, and as proceeding with the motion was within the

scope of the attorney's duty, there is no ground of action herein.

That plaintiff's remedy for the false affidavit must be sought against Riley alone.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs; *Barnard, J.*, thinks the case one for a jury.

### LEASE. COUNTERCLAIM.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Frank W. Ellwood, *applt.*, v. Christopher Forkel, *resp't.*

Decided Jan., 1885.

In an action to recover rent due upon a lease, a breach of covenant to keep the rooms heated by means of a steam heating apparatus, is a proper subject of counterclaim, and it is error to exclude evidence to show that the rooms were insufficiently heated and rendered so uncomfortable that the tenant could not work therein; and the fact that he continued to occupy the rooms during the time the rent accrued is no bar to recover damages for breach of the covenant, especially when the lessor promised to improve the heating.

Appeal from judgment of the Monroe County Court reversing judgment of the Municipal Court of the city of Rochester in favor of plaintiff for \$48.00.

Appellant leased, by a written lease, to respondent a room in appellant's building in the city of Rochester, for the term of fourteen months from February 1, 1880, at an annual rental, the premises to be used as an artist's studio. The lease contained a covenant that the landlord would heat the demised premises by means of the

steam heating apparatus in the building. Respondent entered and continued in possession of the room, holding over after the end of the term mentioned in the lease. The action was for rent due for the months of March, April and May, 1881, during which time respondent occupied the premises. Respondent in his answer claimed \$200 damages for breach of the covenant to heat the room, which he pleaded as a counterclaim. He offered at the trial to prove that during the time he occupied the room under the lease, the building was insufficiently heated so as to render it at times uncomfortable, and so that he could not work at his profession; and upon complaint being made to the landlord he promised, at divers times, to improve the heating if defendant would continue in occupation. The evidence thus offered was excluded.

*Joseph S. Hun*, for applt.

*Fanning & Williams*, for respt.

*Held*, That as the damages offered to be proven arose from a breach of one of the covenants of the lease upon which the action was founded, they were a proper subject of counterclaim; and the fact that respondent occupied the premises during the time the rent accrued did not prevent his claiming damages for breach of the covenant to heat the premises, especially as the offer was to prove that the landlord promised from time to time to improve the heating if defendant would continue as tenant. 35 N. Y., 269; 56 Id., 420; 35 Barb., 523; 4 Hun, 579.

*Edgerton v. Page*, 20 N. Y., 281, distinguished.

The tenant holding over, there was an implied renewal of the lease upon the same terms contained therein. 51 N. Y., 307; 75 Id., 210.

Judgment of County Court affirmed, with costs.

Opinion by *Lewis, J.*; *Haight and Bradley, JJ.*, concur; *Barker, J.*, not voting.

#### SUPPLEMENTARY PROCEEDINGS. RECEIVER.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*William C. Pettibone*, receiver, *applt.*, v. *William E. Drakeford*, *respt.*

Decided Jan., 1885.

A receiver appointed in supplementary proceedings cannot maintain an action to recover the possession of personal property transferred by the judgment debtor before his appointment, by way of mortgage, where the mortgagee has taken possession by virtue of his mortgage.

Appeal from order granting a new trial to defendant upon a case and exceptions.

This was an action to recover a chattel, brought by the receiver. On the 31st of January, 1881, Elizabeth J. Chase was the owner of the property described in the complaint, and on that day, for the purpose of securing defendant for what she then owed him, and for endorsements upon which he had become liable for her, she executed and delivered to him a chattel mortgage thereon, which was

duly filed and refiled. On the 9th of February, 1882, defendant foreclosed his chattel mortgage and became the purchaser of the property at the sale and took possession thereof. In November, 1881, Charles Sheldon recovered a judgment against said Elizabeth Chase and Dexter J. Chase for \$276. On the 28th of December, 1881, and February 4th, 1882, proceedings supplementary to execution were instituted on said judgment. Plaintiff was appointed receiver of both defendants on April 26th, 1882. Thereupon, as such receiver, he brought this action to recover possession of the property described in the complaint and in said chattel mortgage, or the value thereof in case a delivery could not be had. Plaintiff recovered a verdict for \$800. Upon a motion for a new trial made on a case and exceptions, the motion was granted upon the ground, as stated in the memorandum by the justice holding the special term, "That an action for a claim and delivery of personal property cannot be maintained by a receiver appointed in supplementary proceedings in a case where the judgment debtor had transferred the property before the appointment of the receiver, and the mortgagor had taken possession of the property by virtue of such mortgage."

*Beard & Griffin*, for applt.

*A. H. Hadden*, for resp't.

*Held*, That the decision of the special term was correct and in accordance with the adjudications. 40 N. Y., 383; 9 id., 142; 77 id., Vol. 21—No. 5.

58; 29 Barb., 68; 16 How. Prac., 527.

Nor have the rights and powers of the receiver been enlarged or extended by the Laws of 1858, Chap. 314; but they remain, so far as affects the question in consideration, as declared by the Courts before the passage of that act. See 77 N. Y., 58, confirming the authority of these cases, and holding the rights and powers of the receiver of a judgment debtor to be the same and no greater, in respect to the question here involved, than as therein declared. We have examined all of the cases cited by appellant with care, and find no case in conflict with those above cited, and have not been able to find any case where a recovery by a receiver in this form of action has been allowed.

It follows that as to the property in this action the plaintiff, as receiver, could maintain an action to set aside the transfer to defendant as fraudulent as to the creditors represented by him, but could not maintain replevin.

Order granting new trial affirmed.

Opinion by *Childs, J.*; *Haight* and *Bradley, JJ.*, concur.

#### LIBEL.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Charles T. Woodruff, *applt.*, v. The Bradstreet Co., *resp't.*

Decided Jan., 1885.

Publishing an article which states that a judgment has been recovered against a

person is not actionable unless special damages are alleged and proved. Such a publication is not an act from which the law presumes that damages ensued.

Appeal from judgment in favor of defendant, entered on dismissal of complaint.

Action for libel. Defendant is a Connecticut corporation engaged in collecting information as to the financial standing of persons, etc., engaged in business, and in furnishing such information to its customers. Plaintiff is a manufacturer of brick at Watertown, N. Y., but whether doing business on credit or for cash did not appear. In December, 1881, defendant was informed that a judgment had been recovered against J. S. Robinson and C. T. Woodruff for \$4,000, and thereupon published to its customers the following statement: "Watertown, Robinson, J. S., printer, binder and manufacturer of woollens. Judgment v. him and C. T. Woodruff \$4M." A judgment had been recovered for that amount against J. S. Robinson and C. E. Woodruff, who was a different person from plaintiff.

The complaint, after setting forth the above facts, alleged "That such false and libellous publication greatly injured and damaged plaintiff." No special damages were alleged.

The court dismissed the action on the opening, on the ground that the complaint and the opening did not disclose a cause of action.

*Hannibal Smith*, for applt.

*John S. Bird*, for resp't.

*Held*. No error. It is not

claimed, as indeed it cannot be successfully, that the publication is defamatory of the person or reputation of plaintiff. Damages are demanded on the theory, and only upon the theory, that plaintiff's financial reputation was injured, from which pecuniary loss ensued.

Publishing an article which states that a judgment has been recovered against a person is not an act from which the law presumes that damages ensued. Whether damages would ensue from such a publication depends upon special circumstances, like the amount of the judgment, the financial standing and business of the person about whom the article is published, whether it came to the knowledge of others with whom the person dealt, etc. General damages are implied from an act which necessarily injuriously affects persons as a class. To publish of a trader that he is insolvent, or financially embarrassed, injuriously affects any dealer, and special circumstances need not be shown to entitle the person about whom it is written to recover damages. But many dealers would not be injuriously affected by publishing that a judgment had been recovered against them. The law does not necessarily imply that plaintiff sustained damages by the act complained of, and it was necessary for the complaint to state with particularity that damages resulted; and failing in this a cause of action is not stated. 1 Chitty Pl. (16 Am. ed.), 411, 516; 2 id., 543; Van Santv. Pl. (Moak's ed.), 222, 223, 367; 2 Abb., 193; 57 Md., 38;

Bigelow on Torts, 46. Special damages not being alleged, a cause of action is not stated, nor was it claimed in the opening that special damages were sustained.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

### MARINE COLLISION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Emory A. Chase et al., exrs.,  
*respts.*, v. William Belden, *applt.*

Decided Jan., 1885.

Defendant was owner of a steam yacht licensed to proceed from port to port in the United States and by sea to any foreign ports. The yacht was coming up the Hudson river at 9 P. M. under steam, with sails furled, showing, under rule 8 of § 4233, R. S. U. S. at the fore-mast head a bright white light, on the star-board side a green light, and on the port side a red light. She collided with a steamboat belonging to plaintiff's testator. In an action by the latter for damages, *Held*, That the lights shown were correct and that the yacht was not required also to show a central range of two white lights, specified in rule 7 of said section.

Plaintiff's testator owned a steamboat called the "Vanderbilt." Defendant is owner of a steam yacht called the "Yosemite." She was licensed under § 4214 of the Rev. Stats. of U. S. as a pleasure yacht, to proceed from port to port in the United States, and by sea to any foreign ports. She was propelled by steam and was of 481 tons burden. These vessels collided in the Hudson river near Esopus Light, in Ulster county, on July

14, 1882, at about 9 P. M. At the time of collision the *Yosemite* had her sails furled, was proceeding under steam, carried a bright white light at the foremast head, a green light upon her starboard side and a red light upon her port side. She did not carry a central range of two white lights, as required by rule 7, § 4233, U. S. R. S. Upon the trial of this action for damages sustained by the *Vanderbilt* the Court held that the *Yosemite* should have carried these. Plaintiffs had a verdict.

*F. L. Westbrook*, for *applt.*

*P. Cantine*, for *respts.*

*Held*, Error. The lights carried by the *Yosemite* were correct. They were those required by rule 3, § 4233. Within that rule she was an "ocean-going steamer" and a "steamer carrying sail." She was "under steam" and not "under sail." Such a steamer when "under way" shall carry these lights which the *Yosemite* had. But "under way" where? The judge at Circuit said, in substance, "on the ocean," thus inferentially excluding the river. But in rule 3 there are no words "on the ocean," and the river is not in terms excluded. These rules are to be literally construed.

Rule 7, under which it is supposed that it became necessary for the *Yosemite* to carry the range lights, reads: "All coasting steam vessels, and steam vessels other than ferry boats and vessels otherwise expressly provided for, navigating \* \* \* rivers, except those mentioned in rule 6 (rule 6 relates to river steamers navigating wa-

ters flowing into the Gulf of Mexico) shall carry the red and green lights prescribed for ocean steamers and in addition a central range of two white lights, etc." There is no comma after "ferry boats," and hence the meaning is, "steam vessels other than ferry boats and other than vessels otherwise expressly provided for." The *Yosemite* was otherwise "expressly provided for" in rule 3. And rule 2 provides that "the lights mentioned in the following rules, and no others, shall be carried," etc. So that she was forbidden thereby to carry a central range of two white lights.

An examination of these rules will show that all vessels under way on the ocean or inland waters must carry the red and green lights. Looking further then in these rules, but prior to rule 7, to find something expressly provided for which shall be a distinguishing feature, we find in rule 3 that "ocean going steamers and steamers carrying sail" shall carry at the fore masthead a bright white light; and we find that no other steamers may carry this light. We find in rule 4 that steam vessels, when towing other vessels, shall carry two bright white masthead lights vertically, and we find that no other vessels are thus provided for. These classes of vessels, then, can be instantly distinguished, and so can those described in rule 6, vessels navigating waters flowing into the Gulf; and finding no others expressly provided for, we conclude that ferry boats and these vessels just described, but no

others, come within the exception created by rule 7.

The pilot of the *Vanderbilt* testified that he had never seen such lights as those shown by the *Yosemite* and that he did not understand. But if they were correct it was gross negligence in him not to understand them. Some witnesses testified that the night was dark and therefore the lights were all important. The judge charged that the lights carried were wrong.

Judgment reversed and new trial granted.

Opinion by *Landon, J.*; *Bockes, J.*, concurs; *Learned, P.J.*, dissents.

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CREDITOR'S ACTION.  
FRAUDULENT CONVEYANCE.  
N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

George Goetting, *applt.*, v. Matthias Biehler et al., *respts.*

Decided Jan. 9, 1885.

A debtor, during the pendency of an action to recover the debt, is at liberty to convey property in payment of another indebtedness which he deems to be entitled to preferential consideration over that included in the action, and when that is the motive inducing such a conveyance it is not fraudulent as against the suing creditor even though it was made on account of the bringing of his action.

Appeal from a judgment recovered upon trial at Special Term.

This action was a creditor's suit brought to set aside as fraudulent a conveyance of land to defendant Biehler made by one Veronica Sauer during the pendency of plaintiff's action against her in



which the judgment was recovered upon which this action was brought. It appeared that the judgment debtor was indebted to Biehler in an amount equal to the value of the land conveyed to him; but it also appeared, by the answers of Biehler to the questions put to him, that the deed was made because the suit against Mrs. Sauer had been brought by plaintiff; and upon that answer it was insisted that an intent to defraud was established.

*Hyland & Zabriskie*, for applt.

*D. S. Riddle*, for respts.

*Held*, That it did not follow from that answer that the deed was fraudulent, for the purchaser might very well have received it because the suit for the recovery of the debt had been brought without designing to defraud the plaintiff in the action. That, notwithstanding the fact that such a suit was pending, the debtor and defendant in the action was at liberty to convey her property in payment of another indebtedness which she deemed to be entitled to preferential consideration over that included in the action, and it appeared that this was the motive leading to the execution and delivery of the deed in question.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.*, concur.

#### JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Dennis Warden, *applt.*, v. Emma Trost, *respt.*

Decided Jan., 1885.

Plaintiff had verdict for \$44 and judgment was entered therefor. Defendant was entitled to costs and another judgment was entered in her favor for \$74 costs. On defendant's motion both judgments were set aside and judgment was directed for the residue of the costs after deducting the amount of the verdict. *Held*, No error, although plaintiff had assigned his verdict to his attorneys for their services before the judgment for costs was entered.

Appeal from County Court order setting aside judgments entered in favor of the parties respectively, and directing judgment to be entered for the balance of the two judgments.

Plaintiff had verdict for \$44 and judgment was entered for that sum. Defendant had another judgment in the same cause in her favor for \$74 costs. On defendant's motion both judgments were set aside and entry directed of one judgment for the excess of costs over the verdict. Plaintiff's judgment after its entry and before entry of defendant's judgment for costs was by plaintiff assigned to his attorneys in consideration of their services.

*Jenkins, Congdon & Jenkins*, for applt.

*Adelbert Moot*, for respt.

*Held*, No error. There could properly be but one judgment entered in the action, and that should be based on the verdict. 8 Abb., 39. The less amount should be set off against the larger sum to which the respective parties are entitled, and the judgment should be effectual for the difference in favor of the party entitled to it. Code Civ.

Proc., § 3234 ; 10 Abb., 384. This right is one of the incidents of the action which is superior to the lien of the attorney or to the effect of an assignment.

Order affirmed.

Opinion by *Bradley, J.; Barker, Haight and Lewis, JJ.*, concur.

### CONSTITUTIONAL LAW.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In the matter of the application of the Mayor &c. of the City of N. Y. for the appointment of Commissioners to estimate and appraise the damages for taking certain lands for parks and parkways.

Decided Dec. 1, 1884.

An act entitled "An act laying out public places, parks, and parkways in the 23d and 24th Wards of the City of New York, and in the adjacent district in Westchester Co., and authorizing the taking of lands for the same," does not violate § 16 of Art. 3 of the Constitution of the State of New York because it provides that a portion of the parks so laid out shall be used as a parade ground for a division of the national guard.

An avenue, or parkway, from 400 to 600 feet in width and a mile or two in length, joining two parks, is not a road or highway within the meaning of § 18 of Art. 8 of the Constitution of the State of New York, and the legislature is not prohibited by said section from laying out, etc., the same by a local bill, and the power to do so is not abridged by the fact that an existing highway is included within such parkway.

The constitution has not required that lands taken for public parks shall be within the corporate limits of the city for the benefit of whose inhabitants they may be designed. All that can be required is that they shall be so contiguous to the municipal territory as to be con-

veniently accessible by its population for its use and enjoyment.

A direction, contained in an act of the legislature, to commissioners to be appointed thereunder for the purpose of appraising the value of lands to be taken for a public use, to make a just and equitable estimate of the loss and damages sustained by the owners in the taking of their property includes the taking of evidence concerning the value of the property, and the omission to provide in direct terms for the taking of such evidence does not render the act unconstitutional, even if the taking of such evidence were essential under the constitution. Such commissioners are not required by the constitution to take evidence concerning the value of the property intended to be appropriated. They may act upon the knowledge or information acquired by their own personal examination and investigation.

An act providing for the taking of land for public purposes which provides an opportunity for the owners of such land to appear and be heard before the commissioners appointed to appraise it does not violate the provision of the constitution prohibiting any person from being deprived of property without due process of law, and if such opportunity be provided the legislature has power to determine the form and time and manner of notice to be given and personal notice is not necessary.

The right, provided by such an act, of presenting objections to the appraisal of the commissioners, both to the commissioners themselves and to the Court upon the application for the confirmation of their report, upon which any matter which may be alleged against the report is to be considered, includes the right to support such objections by the presentation of affidavits.

When an act of this character has provided that the three commissioners of appraisal shall act together in performing their duties, a provision authorizing a majority of them, in case of a disagreement, to fix the value of the property to be taken does not render said act unconstitutional as violating § 7 of Art. 1 of the constitution. The constitution has not required the concurrence of the three commissioners in the estimates to

be made by them, and, since it does not prescribe what their proceedings should be in this particular, it is within the power of the Legislature to designate and direct it.

All contracts and obligations relating to property must be regarded as having been entered into in subordination to the right of eminent domain, and, consequently, an act providing that leases and other contracts in regard to lands taken for public purposes shall cease and be determined upon such taking does not violate the provision of the Constitution of the United States prohibiting the States from passing any law impairing the obligation of a contract.

When an act taking land for public parks imposes upon the city for the benefit of whose inhabitants it is taken the obligation of making compensation for the same and in default thereof gives a right of action against said city, this is all that is necessary by way of providing for compensation to the owner whose property may be taken.

This was an application by the Mayor, aldermen, and commonalty of the City of New York for the appointment of commissioners to estimate and appraise the damages for taking certain lands designated in Chap. 522 of the Laws of 1884 for parks and parkways. The application was opposed upon the ground that the act under which it was made was unconstitutional for various reasons, one of which was that it was entitled "An act laying out public places, parks, and parkways in the 23d and 24th Wards of the City of New York, and in the adjacent district in Westchester Co., and authorizing the taking of the lands for the same," and that it contained a provision for the use of a part of the lands so taken as a parade ground for the first division of the national

guard, and that it therefore violated § 16 of Art. 3 of the Constitution of the State of New York, requiring the subject of every local act to be expressed in its title.

*John E. Develin, E. Henry Lacombe, John H. Miller and John E. Wells*, for applicants.

*Chas. H. Roosevelt, John C. Shaw, and L. M. Leavy*, opposed.

*Held*, That, for the purpose of complying with this provision of the constitution no more than a general statement of the subject of the act has been required. 59 N. Y., 261, 266; 67 id., 268. That the circumstance that a portion of the land designated for one of the parks is to be appropriated for a parade ground, etc., did not deprive the title of its sufficiency, for the land so to be used would still remain and continue a park but with this additional public use imposed upon it, and the land, still being a park, was within the intelligent import of the title of the act as a part of its subject, and the title might with propriety be held to be as broad as the constitution required it to be for a local act.

The act also provided for the laying out of broad avenues, called parkways, connecting the various parks, one of which parkways was 600 feet in width and about one mile in length, and contained about 80 acres, and another was 400 feet in width and 2½ miles long, and contained about 91 acres. It was contended that the act was unconstitutional for the reason that it laid out a road or highway in contravention to § 18 of Art. 3 of the constitution.

*Held*, That these parkways were not roads or highways within the meaning of the constitution, which includes only the public roads and highways of the State, while these parkways were designed for the convenient passage of persons designing to use and enjoy the parks themselves passing from one to the other and not as roads or highways of this portion of the State; and, for that reason, the legislature was not prevented by this provision of the constitution from laying them out. 52 How., 440; 29 Hun, 303; 92 N. Y., 625; 95 Id., 135.

That the power of the legislature to so lay out these parkways was in no manner abridged by the fact that an existing highway was included as a portion of one of the parkways, for it was within the power of the legislature to subordinate it as a street to this particular use. 67 N. Y., 371, 377.

Part of the land designated for parks by the act was situated without the City of New York, and it was objected that such land could not be appropriated to the use of its citizens.

*Held*, That neither the constitution nor any statute of the State has required that land to be taken for this object shall be within the corporate limits of the city for the benefit of whose inhabitants they may be designed. 1 Seld. 434. That all that can be required is that they shall be so contiguous to the municipal territory as to be conveniently accessible by its population for its use and enjoyment, and that the property in question was so situated.

The act did not in direct terms require the commissioners to take evidence of the value of the property, and this omission was relied upon as a fatal constitutional defect.

*Held*, That if the taking of such evidence should be held to be an essential step in the proceeding, then it might be included within the direction given to the commissioners to proceed and make a just and equitable estimate of the loss and damage sustained by the owners in the taking of their property. 1 Com., 20, 30; 15 Barb., 375. But that the constitution has, neither in terms nor by fair implication, required that the commissioners shall take such evidence, Cons., Art. I., § 7, but they have been left at liberty to proceed upon their own personal examination and investigation and to act upon the knowledge or information obtained in that manner. 5 Ohio, 140; Laws 1813, Chap. 86, § 178. That, moreover, a hearing before the commissioners and before the court upon the question of compensation was provided for the owners of the land by the provision directing notice by advertisement to be given of the completion of the commissioners' report and giving the property owners the right to set forth their objections thereto in writing before the said commissioners, and of the application to the court for its confirmation upon which the court is required to hear any matter which may be alleged against the same.

That these provisions constituted a substantial compliance with that

part of § 6 of Art. I of the constitution which declares that "no person shall be deprived of life, liberty or property without due process of law," for when an opportunity to appear and be heard is secured it is wholly within the power of the legislature to determine the form and time and manner of notice to be given, and personal notice is not necessary. 45 N. Y., 356, 359; 48 N. Y., 313, 317; 80 N. Y., 565, 572; 82 N. Y., 196, 201. That the right to object to the report included the right to support such objection by affidavits, 3 Wend., 452; 19 Wend., 658, 662; 1 Hill, 191, 193, and that it was no objection to the proceeding that the right to produce such evidence was not given until after the commissioners should have made their estimates of the compensation to be allowed. 1 R. S., 6th ed., 937, § 18; 2 Revised Laws 1813, 413.

*Stuart v. Palmer*, 74 N. Y., 183, distinguished.

The authority of the act was further assailed upon the ground that the legislature could not authorize a majority of the commissioners to conclude the owners in their estimates of value and their report to the court, upon the ground that the constitution required that the compensation to be awarded should be determined by not less than 3 commissioners. Const., Art. I, § 7.

*Held*, That, throughout the act, the commissioners were required to act together, and it was only when they should be unable to reach a unanimous agreement or

estimate that two were authorized to act, and that the constitution has in no manner required the concurrence of the three commissioners in the estimates to be made. That the constitution has not prescribed what their proceeding should be in this particular, and, accordingly, it was within the power of the legislature to designate and direct it. 2 Kernan, 190; 11 Abb., 189; 62 N. Y., 580, 586; 3 R. S., 6th ed., 525, § 18; Chap. 606, Laws 1875, § 20.

The act also provided that all leases and other contracts in regard to the lands taken for the parks should respectively cease and determine upon the confirmation of the commissioners' report; and, for that reason, it was urged that it was in violation of so much of the Constitution of the U. S. as prohibited the States from passing any law impairing the obligation of contracts.

*Held*, That all contracts and obligations relating to property must be regarded as having been entered into in subordination to the right of eminent domain and to the duty to make compensation upon which it has been rendered dependent, 43 Penn., 495, 504; 6 How., U. S., 507, 532-3, 588, and that, therefore, this objection was of no force.

The act was also resisted upon the further ground that no proper provision was made for the payment of the estimates. The act provided for the issuing of bonds by the city to procure the money necessary, but under such restrictions that it was deemed that the

money could not be realized upon them. It also provided, however, that within four months after the confirmation of the report the city should pay for the property to be taken, or in default thereof a right of action against the city to recover the compensation awarded was given.

*Held*, That by this latter provision an absolute and unqualified obligation for payment was created and in default of it an adequate remedy for its recovery was given, and that is all that is necessary by way of providing for the making of compensation to the owner whose property may be taken. 18 Wend., 10 : 1 Kernan, 308, 313-14. And that, even if the city should fail to obtain the money upon the bonds directed to be issued, such failure would not prejudice the rights of the persons entitled to payment of the estimates under the above provision.

Application granted.

Opinion by *Daniels J.*; *Davis P. J.*, concurs.

#### WILLS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Timothy W. Gooding, *applt.*, v. Spencer A. Brown et al., *respts.*

Decided Jan., 1885.

Two brothers, A. and B., owned real and personal property as tenants in common. They agreed by oral promise that each should by will leave to the other all his property, and they accordingly executed their wills and left them with their attorney. Afterward B. destroyed his will and died intestate. *Held*, That A. cannot sustain an action against B.'s heirs for specific performance of the parol agreement.

Appeal from judgment on Special Term decision, dismissing complaint.

Plaintiff and W. were brothers owning real and personal property as tenants in common. They orally agreed that each of them should by will devise and bequeath to the other all his property, except that W. should bequeath \$10,000 to their sister. The wills were accordingly executed and deposited with their attorney. The sister died, and W. afterward took his will away and destroyed it, and subsequently died intestate. This action is brought against his heirs and next of kin for the purpose of establishing and proving the will of W., or if that cannot be done, the complaint prays that plaintiff may have judgment directing defendants to release and convey to him all their interest in the estate owned by W. at his death, so as to vest title thereto in plaintiff as effectually as the will would have done.

*J. Henry Metcalf* and *W. F. Cogswell*, for *applt.*

*E. M. Morse* and *E. G. Lapham*, for *respts.*

*Held*, That there is no support for the proposition to establish and prove the will. This action is in its nature one for specific performance of the oral agreement. The agreement on W.'s part was in effect an agreement to sell the property and vest title in a particular manner. It was within the statute of frauds and void. There was no such part performance as to bring the contract within the rule supporting the right to enforce

performance. Plaintiff has not been placed in a situation which is a fraud upon him unless the contract is executed. 2 Story Eq. Jur., § 761; 1 Johns. Ch., 149; 14 Johns., 15; 66 N. Y., 227; 17 W. Dig., 104; 45 N. Y., 589; 52 id., 494. The revocation by W. of his will was a mere failure to transfer his property by will to plaintiff. The latter lost nothing; he simply failed to acquire by will the estate of his brother. He was deprived only of an expectancy. The element of fraud which equity will recognize in support of the right to execution of a contract within the statute does not appear in this case. 103 Mass., 408.

*Johnson v. Hubbell*, 2 Stockt. Ch., 332; S. C., 5 Am. Law Reg., 177; *Parsell v. Stryker*, 41 N. Y., 480; *Podmore v. Gunning*, 7 Sim., 644; *Stephens v. Reynolds*, 6 N. Y., 454; *Williams v. Fitch*, 18 N. Y., 546; *Todd v. Weber*, 95 N. Y., 181; *Re O'Hara's will*, id., 403; *Sherman v. Scott*, 27 Hun, 331, distinguished.

Judgment affirmed, with costs.

Opinion by *Bradley, J.*; *Haight, Angle* and *Childs, JJ.*, concur.

#### LEASE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Robert Simpson, respt., v. George B. Swikehard, applt.*

Decided Jan., 1885.

The lessor in a lease under seal in which there is no undertaking on his part to make repairs is not chargeable with the expense of repairing.

While the covenants in a lease under seal

cannot be modified by parol executory agreement, yet the complete execution of the parol agreement may operate as a satisfaction of the undertakings in the lease.

Appeal from judgment on referee's report. On April 1, 1879, plaintiff by his agent B. made a lease under seal of certain premises to defendant, for three years, rent payable in monthly instalments. In this action plaintiff recovered judgment for the rent for April and May, 1879. When the lease was made one D. was in possession of the premises under a prior lease which terminated March 31, 1879. D. remained in possession until May 1, 1879. The evidence fairly authorized the referee to find that D.'s possession was continued at the request of plaintiff's agent B. with the understanding that such possession through April should be taken as satisfaction of the rent as against defendant for that month, and that at the end of the month of April that agreement became executed. There was conflict of testimony as to whether B. promised to make repairs. When defendant took possession on May 1, repairs were made which defendant paid for. B's agency was evidenced by a power of attorney under seal giving him merely power to lease the premises and collect the rents.

*Patrick McIntyre*, for applt.

*W. H. Whiting*, for respt.

*Held*, By the terms of the lease defendant was liable to pay rent from its date and plaintiff was not chargeable with repairs. 45 N. Y., 119; 3 Duer, 464; 52 N. Y., 572.

The term of the lease could not before breach be substantially modified nor surrendered by parol executory agreement of the parties to it. 21 Wend., 628; 3 Rob., 7, 16; 7 id., 544; S. C., 36 How., 275; 30 N. Y., 306; 72 id., 141. But the complete execution of that agreement might operate to satisfy *pro tanto* the undertaking to pay. 14 Johns., 330; 21 Wend., 632; 6 Duer, 208; 72 N. Y., 141; 15 Wend., 400; 2 Barb., 180; 25 Hun, 116. The parol lease for April to D. was valid between the parties, and when executed might be treated practically, if not strictly in a legal sense, as a surrender of so much of the term demised to defendant. 10 Adol. & Ell., N. S., 944; 2 Barb., 180; 15 Wend., 400; 30 N. Y., 453. The arrangement was within B.'s agency. 21 Wend., 279; 3 Hun, 591.

Defendant is not entitled to be re-imbursed for repairs. It was not within B.'s agency to bind plaintiff for repairs, and it is not important that defendant was not actually advised of the extent of B.'s power. 25 N. Y., 595; 34 id., 30. Agreement by the landlord to repair will not be implied. Nor would a bare parol promise to that effect, made after the execution of the lease, bind the landlord. 2 Rob., 214; 37 How., 5; 45 N. Y., 119; 43 How., 333. Moreover the question whether B. promised to make repairs was answered in the negative by the referee, whose finding is conclusive.

Judgment reversed with new trial, costs to abide event, unless plaintiff stipulate to deduct from

the judgment the amount of April rent with interest. Then judgment so modified affirmed without costs of appeal.

Opinion by *Bradley, J.*; *Barker, Haight* and *Rumsey, JJ.*, concur.

### PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Henry S. Manning, *respt.*, v. Henry Case, *impld.*, *applt.*

Decided Jan. 9, 1885.

An exception to the refusal of the Court to submit to the jury any other question than the amount of plaintiff's recovery is not equivalent to a request to submit to them a particular question for their consideration. In order to take advantage of an error of the Court in failing to submit a particular question to the jury there should be a distinct request that such question be submitted to them as one of fact for them to consider.

Appeal from judgment entered upon verdict.

Action for goods sold and delivered to a copartnership composed of defendants. The defense of appellant was that he was not a copartner of the other defendant. The trial judge, however, held that the partnership was established by the evidence and submitted to the jury only the question of the value of the goods sold. Appellant excepted to the refusal of the Court to submit any other question to the jury.

*E. S. Clinch*, for *applt.*

*G. H. Fletcher*, for *respt.*

*Held*, That the evidence upon the question of partnership was neither clear nor very satisfactory,



but still there was evidence upon that subject quite sufficient to go to the jury.

That the exception to the refusal of the Court to submit to the jury any other question than that of the amount of plaintiff's recovery was not equivalent to a request to submit the question whether or not the partnership was established to the jury. That if defendant desired to go to the jury upon that question as one of fact for them to consider, there should have been a distinct request to submit that particular question. That upon the evidence, however, the jury would probably have found against him and that finding would have been sustained.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurs; *Brady, J.*, dissents.

#### MUNICIPAL CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The City of Rochester, *respt.*, v. Ernest M. Close, *applt.*

Decided Jan., 1885.

A power to regulate the ringing of bells and the crying of goods or other commodities for sale at auction, or otherwise, relates solely to the manner of advertising a sale by public outcry, and authorizes the Common Council to regulate that custom or manner of advertising, but confers no authority to regulate or prohibit a sale of goods at auction within the store or building of the seller. Therefore, an ordinance prohibiting the sale of jewelers' goods at auction after sunset, under a penalty, is unauthorized and void.

Certiorari to review the trial and conviction of defendant by the Police Justice of Rochester.

Defendant was convicted for violation of a city ordinance relating to the sale of jewelers' goods at auction. The ordinance provided that all sales of watches, jewelry, etc., at public auction by an auctioneer shall be made in the daytime and between sunrise and sunset, and it shall, after the passage of this ordinance, be unlawful for any person to expose for sale at public auction any goods of the class specified after sunset of any day, under a penalty of \$50. It was decided that the only authority for the Common Council to pass this ordinance was derived from this provision of the charter: "To regulate the ringing of bells and the crying of goods and other commodities for sale at auction, or otherwise, and to prevent disturbing noises in the streets." The question was whether this provision warranted the passing of such an ordinance.

*C. M. Allen*, for *applt.*

*J. N. Bleckley*, for *respt.*

*Held*, That the charter does not confer any authority on the Common Council to regulate or prohibit a sale of goods at auction within the store or building of the seller, but that it relates solely to the manner of advertising a sale by public outcry, and authorizes the council to regulate that custom or manner of advertising, but not to interfere in any manner with the sale, whether at auction or in any other manner adopted by the seller. That the charter was intended to authorize the council to pass such ordinances relating to the matters aforesaid as would in-

sure the peace and quiet of the public and prevent such noises and disturbances in the streets of the city as would cause annoyance and discomfort to the inhabitants.

An ordinance passed by a city must be made to conform strictly to the provisions of the charter. 43 Barb., 48; 6 N. Y., 92.

Judgment reversed, with costs, and plaintiff ordered to restore to defendant the sum of \$50 collected from him on execution.

Opinion by *Childs, J.*; *Haight, Bradley* and *Angle, JJ.*, concur.

#### LEASE. SURETY.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George Clarke, *respt.*, v. Richard Quinn, *applt.*

Decided Jan., 1885.

Proof that the value of the products of a farm exceeded the rent, and that the lessor did not take them will not constitute a defense to an action against the surety on the lease under a covenant that the products should be the property of the lessor until the rent is paid. It must appear that the lessor took them or was negligent in not doing so.

An action may be maintained against the surety on a lease without joining the principal.

Appeal from judgment in favor of plaintiff, entered on verdict directed by the court.

Action brought against defendant as surety on a lease to recover the rent remaining unpaid. Plaintiff leased a farm to one D. for one year from April 1, 1879, for \$300 payable at the commencement of the term, defendant signing as surety. D. occupied the farm dur-

ing the year, but failed to pay the rent.

The lease contained a covenant that all of the products of the farm and the live stock raised thereon should be and remain the property of the lessor until the rent should be fully paid, and under this covenant the only defense is interposed.

Defendant called and proved by plaintiff that he had taken none of the products and did not know what had become of them. Defendant then offered to show that the products of the farm during the year exceeded \$300 in value. This was excluded by the court on the ground that it would not constitute a defense unless defendant proposed to go further, and the court intimated what should be shown. Defendant did not state that he proposed to go further and offered no further evidence and thereupon the court directed a verdict for the amount of rent due.

*James Parks*, for *applt.*

*J. I. Sayles*, for *respt.*

*Held*, No error. Defendant did not offer to show that plaintiff took any part of the crops, or that he was in any respect negligent in not taking them; thus failing to bring the case within the rule that a surety is discharged if the creditor surrenders or negligently loses collateral security of sufficient value to pay the debt. A creditor may sue the surety before resorting to any collateral security he may have. 6 Ves., Jr, 714; Burge on Suretyship (1 Am ed.) 324.

*Wright v. Austin*, 56 Barb., 13, distinguished.

It is claimed that the action cannot be maintained against the surety without joining the principal.

*Held*, Untenable. As between the creditor and the surety the surety is severally liable. "With respect to the rights of two or more persons joining in a contract as creditors the general rule of construction is to the effect that a contract will be construed to be joint or several according to the interests of the parties if the words are capable of that construction, or even if they are not inconsistent with it; if the words are ambiguous or will admit if it, the contract will be joint if the interest be joint, and it will be several if the interest be several." Leak's Cont., 457. The interest of the surety in this contract was not a joint, but several one, and the suit is properly brought.

Judgment affirmed, with costs.

Opinion by *Follett J.*; *Hardin, P. J.* and *Boardman, J.*, concur.

### MURDER.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

James Horace Jones, *applt.* v. The People, *respts.*

Decided Feb., 1885.

The prisoner was much younger than his wife, for whose murder he was convicted. They lived on bad terms, and had been married eighteen months. The prisoner had beaten her and had fired a pistol at her on two occasions. He was a man of bad temper and occasionally drank to excess. On the morning of the murder he had taken two or three drinks of whiskey with a customer, but appeared rational.

Soon after taking the drinks the deceased came into the bar-room of the saloon which they kept and the prisoner at once commenced to quarrel with her, struck her in the face and pushed her against a table. Her mother interfered and also the son of deceased, a boy. The prisoner knocked them both down. He then knocked the deceased down and kicked her until remonstrated with by a bystander. Thereupon he left deceased, walked around a corner of the saloon, a distance of eighteen feet, got behind the bar, took out a revolver, cocked it and fired a shot at the deceased from which she soon died. He showed no remorse, and did not seem much excited and not at all irrational. The jury found him guilty of murder in the first degree. *Held*, That the questions whether the verdict was supported by the evidence and of premeditation were rightly decided by the jury.

Appellant was convicted of murder in the first degree for killing his wife on July 3, 1884, at Troy.

*Wm. J. Ludden*, for *applt.*

*L. W. Rhodes*, for *respts.*

PECKHAM, J. Under § 527, Code Crim. Pro., as amended by Ch. 360, Laws of 1882, this court must review the decision of the Oyer and Terminer and must grant a new trial if the verdict be against law or if justice requires a new trial, whether any exception be taken or not. This section grants new and extensive powers and they should be exercised with great circumspection. A case must be very clear to authorize a court to grant a new trial because justice requires it. The whole theory of our law is based upon the great weight to be attached to the verdict of a jury. It is claimed here that the verdict is against the evidence, and also that there could not be a conviction for an offense

higher than murder in the second degree. We think the verdict proper. There was evidence from which the jury might have found these facts: That the prisoner and deceased were married in March, 1883, he being 20 and she over 30, unattractive and having children, one 13 years old, by a former husband; that as a soldier's widow she had a pension of some \$1,700, with which the saloon where the murder was done was bought, and which was thereafter kept by the prisoner and deceased; that they frequently quarreled, and that he often swore at and struck her, threatened to kill her, and on two occasions fired off a pistol in her room, greatly frightening her and causing her to faint; that at times the prisoner drank to excess, and once since his marriage was treated for *delirium tremens*; that on the morning of July 3, 1884, he took two or three drinks of whiskey with a customer; very soon after his wife came in the bar-room. He quarreled with her and struck her in the face and kicked her against a table. At this moment the mother of the deceased rushed at the prisoner to defend her child; the prisoner knocked her down. Then a boy, the son of deceased by her first husband, rushed at the prisoner with a large fork. The prisoner struck and disabled him. He then kicked his wife again, but upon being remonstrated with by a bystander stopped. He then walked away from his wife, went around a corner of the room and got behind the bar. To do this he had to

walk about 18 feet, and his wife was distant from him 13 feet. He took a revolver from a drawer, cocked it and deliberately shot her in the stomach, a wound from which she soon died. He showed no remorse. The same afternoon he denied shooting his wife, gave several false versions of the affair, but acted and talked rationally. He looked as if he had been drinking when he arrived at the jail soon after the murder, but nothing peculiar was noticed about him.

We say these facts might all have been found by the jury. The jury, upon a perfectly fair charge, found that there was a deliberate and premeditated design to effect the death of deceased. This question was their peculiar province to decide. We shall not interfere. The evidence is stronger than that in *People v. Conroy*, 97 N. Y., 62.

Judgment affirmed and proceedings remitted, etc.

*Bockes and Landon, JJ., concur.*

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People v. The Universal Life Ins. Co. *In re* Henry C. Bowen.

Decided Jan. 9, 1885.

B. petitioned the court for an order requiring the receiver of an insolvent insurance company to deliver to him certain paid-up policies of insurance which he claimed to own and which were in the hands of said receiver. The receiver resisted the application upon the ground that such policies had been held by the company as collateral security for the

payment of a note made by B. *Held*, That B. could show by parol evidence that the money for which the note was given was not a loan but an advance for services to be performed, which had been so performed.

Appeal by the Receiver of the Universal Life Ins. Co. from an order confirming with slight modifications the report of a referee.

Henry C. Bowen petitioned the court for an order requiring the Receiver of the Universal Life Ins. Co. to deliver to him certain paid-up policies of life insurance which were held by such receiver. The receiver resisted the application upon the ground that the policies had been delivered to the company by Bowen as collateral security for the payment of a note made by him which had not been paid. The matter was referred to a referee to take evidence and report the same to the court with his findings of fact and conclusions of law thereon. Before such referee it appeared that Bowen had relieved the insurance company of a lease upon which it was liable for rent and which it did not desire, and that in consideration therefor the company had agreed to advertise to the amount of \$2,000 per year for six years in a paper published by Bowen and to pay \$6,000 of such amount in advance, and that the company desired that this \$6,000 should appear to be a loan and that Bowen should give his note therefor, the payments upon which should equal and fall due at the same time as the payments to Bowen upon the advertising contract and so offset each other. To this Bowen agreed and gave his

note for said amount and deposited the policies sought to be recovered ostensibly as security therefor. It further appeared that Bowen had advertised the insurance company for three years, and had therefore earned the \$6,000. The referee reported in favor of granting Bowen's petition. It was insisted, however, by the receiver of defendant, that the contract for advertising and the note being in writing, the above facts could not be proved by parol and that the relief afforded to Bowen was improperly granted.

*Charles J. Everett*, for applt.

*George C. Holt*, for resp't.

*Held*, That the rule excluding parol evidence does not prevent a party to an agreement from proving, by way of defence, the existence of an oral agreement made in connection with the written instrument where the circumstances would make the use of the latter for any purpose inconsistent with the oral agreement, dishonest or fraudulent, and that as the consideration of an agreement is open to inquiry, the party may show that the design and object of the written instrument were different from what its language if alone considered would indicate, 92 N. Y., 529, and that it would be manifestly dishonest to allow the transaction between Bowen and the Universal Co. to be treated as a loan when in fact it was an advance for services to be rendered, to secure which a valuable consideration was given.

Order affirmed, with the exception of a part fixing the value of

the policies in question, for the reason that that subject was not included in the order of reference.

Opinion by *Brady, J.*; *Davis, P.J.*, and *Daniels, J.*, concur.

### COMMON CARRIERS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Thomas G. Poole, *respt.*, v. The D., L. & W. RR. Co., *applt.*

Decided Jan., 1885.

Defendant sold separate tickets to plaintiff over its own and a connecting line in which it was not interested, but for which it sold tickets as agent. *Held*, that the separate tickets were insufficient evidence to justify the conclusion that defendant contracted to carry plaintiff beyond its line, and that it was not liable for injuries occurring on the connecting line.

Appeal from judgment in favor of plaintiff, entered on verdict for \$350 damages, and from order denying motion for a new trial on the minutes.

Action to recover for injuries sustained by plaintiff. Defendant is a common carrier of passengers by a railroad extending from Oswego to Syracuse, and passing a station called Fulton. The village of Fulton is about one mile east of the station, and between the station and village a line of omnibuses is run by one H. By an arrangement between defendant and H. each sold tickets over the line of the other and accounted for the sales, but they did not share in the profits and losses of the business of the respective parties to the arrangement. The tickets were on separate cards, one for each line.

On Nov. 21, 1882, plaintiff purchased of defendant at Oswego a railroad ticket to Fulton station and an omnibus ticket to Fulton village. Defendant safely carried plaintiff to Fulton station, where he entered an omnibus. An accident happened, by which plaintiff was thrown from the omnibus and injured.

A motion for non-suit was denied, as was also a motion for a new trial on the minutes, made on the grounds that the verdict was contrary to law; that it was contrary to evidence, and on the exceptions taken.

*Rhodes, Coon & Higgins*, for *applt.*

*W. C. Crombie*, for *respt.*

*Held*. Error. The separate tickets delivered to plaintiff, whether regarded as contracts or tokens, are insufficient evidence to justify the conclusion, as a matter of law, or of fact, that defendant contracted to carry plaintiff beyond Fulton station. 53 N. Y., 363. See also 61 N. Y., 538; 94 id., 278; 56 Me., 234; 107 U. S., 102; 99 Mass., 220; 100 id., 26; Wharton on Neg., §§ 582, 583; 2 Rorer on Railroads, 975.

Each ticket is, as it purports to be, an independent contract or token; one by the railroad, to carry from Oswego to Fulton station, and the other by the omnibus line to carry from Fulton station to Fulton village. In this case the uncontradicted evidence is that the two lines were not connected in business except that each, as agent, sold tickets over the other. Under the evidence the court erred in re-

fusing to nonsuit and again in denying the motion for a new trial on the minutes.

*Buxton v. Northeastern RR. Co.*, L. R., 3 Q. B., 549, and *Bristol & Exeter R. v. Collins*, 7 H. L. Cas., 194, distinguished.

Judgment and order reversed and new trial granted, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

### MUNICIPAL CORPORATIONS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

*Ellen Pompey, respt.*, v. *The Village of Saratoga Springs, applt.*

Decided Jan., 1885.

Snow and ice from time to time slid off the roof of a barn which stood at the edge of a sidewalk, and this caused an obstruction forty feet long and nearly three feet high, extending across the whole width of the sidewalk. This pile at both ends descended sharply. It had existed two weeks. It was rather difficult to get up on it and to get down from it. Plaintiff in the daytime passed over it, but, in descending, slipped, there being a light snow on the ground, and was injured. *Held*, That the question of contributory negligence was for the jury.

A statute authorizing a tax for the "support of streets" imposes upon a corporation the duty of, and affords it the means for, keeping the sidewalks of such streets free from dangerous accumulations of snow and ice.

Plaintiff fell upon a sidewalk in the defendant village. It was shown that from time to time ice and snow slid off from the slate roof of a barn on the line of the sidewalk and that it had gradually

formed upon this sidewalk an obstruction. This was forty feet long and nearly three feet in height, and at either end it descended very sharply. At the time of the accident this icy accumulation was covered with a light snow. It was rather difficult to climb up it and descend from it. Plaintiff, after having passed over the heap, fell as she was descending. The obstruction had existed two weeks at least. Defendant asked the court to charge that if the obstruction was visible and apparent to any passer-by it was negligence in plaintiff to try and cross it, and that she should have gone around it. The court refused so to charge. Plaintiff had a verdict of \$8,000.

*C. S. Lester* and *John L. Henning*, for applt.

*Chas. M. Davison* and *L. B. Pike*, for respt.

*Held*, That the charge requested was properly refused. Whether plaintiff was negligent or not was a question of fact. A person who, in the lawful use of a highway, meets with an obstacle therein may yet proceed if it be consistent with reasonable care so to do, and generally this is a question of fact, depending upon the nature of the obstruction and the surrounding circumstances. We do not say that there might not be a case where the danger of going on was so perfectly apparent that doing so might not be negligence as matter of law. But this was not such a case. See 131 Mass., 169; 76 N. Y., 329; 83 Id., 14.

The obstruction here extended across the whole sidewalk. To

have avoided it entirely, therefore, it would have been necessary for plaintiff to go out in the street. When this is the situation, we cannot say that going on and making a careful and cautious effort to cross the obstruction is in all cases negligence as matter of law. Plaintiff may have been passing along, intent upon her business, assuming that the sidewalk was safe, and perhaps did not notice its condition; or if she did not, may have been excused for not noticing it. The requests of defendant took from the jury any consideration of all these questions.

Mere knowledge, previously obtained, of an obstruction does not necessarily show that plaintiff noticed it at the time of the accident: and whether, if the plaintiff did not notice the obstruction, she would then be guilty of negligence, has been held to be a question of fact. 11 Hun, 101; 28 Id., 110; 69 N. Y., 166; 20 W. Dig., 328.

Defendant also defends upon the ground that there was no way under the village charter (Laws of 1866, Chap. 220) of raising funds to keep the streets free from a dangerous accumulation of snow and ice. We do not think this well founded. By § 38 of this charter the village superintendent, within ten days prior to the annual election, must report in writing to the trustees the condition of (among other things) the sidewalks and the probable amount necessary to keep them in good order during the coming year. It is not keeping them in good order to allow a dangerous accumulation of ice and

snow. By § 54 the trustees are authorized, for the purpose of providing the means of sustaining the several departments of the village and defraying the expenses of the corporation, to levy and collect an annual tax not exceeding \$7,500, for the support of roads, bridges, culverts, streets, lanes and alleys within the village. This language includes the sidewalks of streets, and the expression for the "support of streets," etc., when thus used means keeping the whole street, including the sidewalk, in order and therefore keeping them free of dangerous obstacles. There was no proof of lack of funds in this department. The evidence shows that the superintendent was of opinion that he could not use the funds of this department to clean sidewalks. In this construction we think he was wrong. As no lack of funds is shown, 50 N. Y., 236, and as there were methods provided for raising them, this defense is not made out.

Judgment affirmed, with costs.

Opinion by *Peckham, J.*; *Learned, P.J.*, concurs; *Fish, J.*, dissents.

### SPECIFIC PERFORMANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Henry C. Van Arsdale, *respt.*,  
v. William Perry, *applt.*

Decided Jan., 1885.

A parol promise by the owner of land to give it to another, accompanied by actual delivery of the possession thereof to him, will be enforced in equity where the promisee is induced by such promise to make



substantial improvements and considerable expenditures on the premises with the knowledge of the promisor.

Where the owner of land promised to give to his newly married daughter one of his farms if she would abandon her intention of removing to another county and take up her residence near him, and she and her husband, relying upon such promise, and in pursuance thereof, took possession, cultivated it, erected buildings and made other substantial improvements and continued in sole possession for twenty years, it was held that her heirs were entitled to specific performance.

Appeal from judgment entered on decision of Special Term.

Action for specific performance of a contract for the conveyance of lands to Harriet Van Arsdale, plaintiff's ancestor. The trial court found that said Harriet was defendant's daughter and was married in 1858; that she and her husband intended and proposed to leave her father's house and move to the western part of the State; that defendant desired and solicited her to remain near him and his family. That defendant owned and occupied 400 acres of land, and agreed verbally with her, that if she and her husband would not move away, but would move upon, take and accept the lands described in the complaint, and occupy the same and remain and make her home thereon and cultivate the same and keep it in repair, and pay the taxes, and make such improvements as they should deem necessary and beneficial, and accept the lands as her portion of defendant's lands to which she would be entitled as his heir at law, that he would deed the premises to her. That thereupon defendant delivered posses-

sion to her in June, 1858; that she and her husband moved upon the premises, and had ever since occupied and had the sole possession and control thereof, under said contract; paid the taxes, cultivated and improved it, and with the knowledge of the defendant erected buildings, repaired the fences, ditched the farm, eradicated foul weeds, etc., from the farm, and enriched and brought it under a better state of cultivation, making it several thousand dollars more valuable. That during all this time said Harriet used and managed the farm as though it were her own, defendant not claiming or pretending to have any control thereof. Upon these facts as found the court decreed a specific performance.

*W. F. Cogswell*, for applt.

*Howland & Wheeler*, for respt.

*Held*, That there was a good consideration to sustain the agreement, and that part performance by taking possession, making improvements, etc., warranted a court of equity in decreeing a specific performance of the agreement.

Plaintiff's ancestor, in consideration of the agreement, abandoned her intention of removing, remained near her aged parents so as to be in a situation to comfort and minister to their wants in their old age. It was the society of his daughter and her care in his declining years defendant did not wish to be deprived of, and to obviate which he made this agreement. If defendant had agreed to convey this farm in case she should remain a member of his family for any specified

time, the consideration would have been sufficient to uphold the agreement; and we are unable to distinguish between such an agreement and the one in this case. The substance of the agreement was that she should abandon plans which were formed, at the request of defendant and for his personal comfort and convenience, in consideration of his agreement.

But we think it is not necessary that any consideration should have passed from plaintiff to defendant, at the time that the agreement was made or subsequently, to sustain the judgment. A parol promise by the owner of land to give it to another, accompanied by the actual delivery of the possession thereof to him, will be enforced in equity, where the promisee, induced by the promise, has made substantial improvements and considerable expenditures upon the premises, with the knowledge of the promisor. 43 N. Y., 34; 36 id., 327; 7 Hun, 538; 96 Ill., 591; 55 Cal., 94; 6 Iowa, 279; 41 Ill., 101.

To deprive plaintiff's ancestor of the benefit of her expenditures, etc., induced by the promise of defendant to convey, and secure them to defendant, would be a gross fraud upon her; and to prevent such a fraud being practiced upon her a court of equity will interfere and decree a conveyance. Whether treated as a sale by parol or as a gift the court applied the law correctly and the decree granted necessarily followed from the facts found.

Judgment affirmed.

Opinion by *Childs, J.*; *Bradley* and *Haight, JJ.*, concur.

### BOND OF INDEMNITY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Mutual Life Ins. Co. of N. Y., *applt.*, v. Robert S. Holt et al., *respts.*

Decided Jan. 9, 1885.

When it is the custom of an insurance company in the case of rival claimants to the proceeds of a policy to pay the money into the court and compel the claimants to litigate their rival claims between themselves, but at the request of one of such claimants the company departs from such custom and pays over the money to him taking a bond conditioned to indemnify the company from all costs, liabilities, charges, damages and expenses to which it may be subjected in consequence of said payment, and the other claimant subsequently brings an action against said company for the proceeds of the policy but is defeated, the indemnitors upon such bonds are liable for the expenses incurred by the company in defending said action.

When it appears from the circumstances preceding and attending the giving of such a bond that it was the intention of the parties to protect the company against the happening of a certain contingency the bond will be construed so as to give effect to this intention although the contingency in question was not mentioned in the recital of the bond.

Appeal from a judgment dismissing plaintiff's complaint.

Plaintiff issued a policy upon the life of Thomas Taylor, payable to his wife, Mary H. Taylor, her executors, administrators, or assigns, or, in case of her death before her husband, leaving children, to such children or their guardian. The *respt.* Robt. H. Holt claims the proceeds of this policy

as executor of said Mary H. Taylor, she having died before her husband and without leaving children. The proceeds of the policy were also claimed by the relatives of her husband. Upon the application of Holt for the payment of the policy to him he was informed by the company of this rival claim and of the custom of the company in such cases to pay the money into court and compel the claimants to litigate their claims between themselves, but upon the request of said Holt the company consented to forego said custom and pay the money to him, taking from him a bond in which it was recited that it was represented by him that Mary H. Taylor had left no child and that the company upon the faith of such representations had paid to said Holt the amount due upon said policy, and which was conditioned to indemnify the company from all costs, liabilities, charges, damages and expenses to which it might be subjected in consequence of said payment. The other claimants subsequently brought an action against plaintiff which it defended and which resulted in the dismissal of their complaint. This action was then brought upon the bond to recover the expenses which plaintiff had been put to in defending the said suit. After the close of plaintiff's case defendant moved to dismiss the complaint upon the grounds (1) that the bond indemnified only against valid claims and the expense of unsuccessfully resisting the enforcement of valid obligations, not against

the expense of successfully resisting invalid claims; that the expense of defending the suit in question was not in consequence of the payment to Holt, and (2) that the general words of the condition were limited by the special words of the recital and that no breach had been proven within its proper and true meaning. This motion was granted.

*Julien T. Davies*, for applt.

*Robert W. DeForrest*, for respts.

*Held*, That by making payment to Holt upon his importunity plaintiff surrendered the right of interpleader and took upon itself the risk and burden of any suit that might be brought against it by the other claimants to the fund. That it was shown by the circumstances surrounding the execution of the bond that this was the very peril and damage in the contemplation of the parties. That in consequence of the payment to Holt, plaintiff was compelled to defend a suit which if such payment had not been made could at once have been met by an action of interpleader, or an order of substitution under the provisions of the Code without the expense to plaintiff to which it was subjected by a necessary defense to the suit. That it therefore required no forced strain of the language of the bond to hold that plaintiff was subjected to the costs and expenses sought to be recovered in consequence of the payment of the money to Holt, and that the indemnitors were liable therefor.

Judgment reversed and new trial ordered.

. Opinions, by *Davis, P.J.*, and *Daniels, J.*

*Brady, J.*, dissented upon the ground that there was no proof that one of the indemnitors had ever had any notice of the fact that the bond was intended to cover any other contingencies than those mentioned in its recital, and that the action, therefore, could not be maintained against him, and, consequently, since the bond was a joint one, it could not be maintained against the others.

### VENUE. HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Jacob H. Clute, *applt.*, v. Robert Robinson et al., Commissioners, *respts.*

Decided Nov., 1884.

Where plaintiff brought an action against defendants as Commissioners of Highways of a town in the County of Schenectady, charging that he had rendered services to their predecessors in office and that defendants, as such commissioners, had refused to pay him therefor, and had neglected to raise money to pay him as was their duty, *Held*, That, under Code Civ. Pro., § 983, subd. 2, Schenectady was the proper county for the trial of the action.

This action was brought to recover for legal services rendered the Commissioners of Highways of a town in the County of Schenectady, whose successors in office are the defendants. The complaint alleged that defendants refused to pay the claim and have neglected and refused to take the necessary and proper steps to raise the amount although it is their official duty to do so. Defendants claim

that Schenectady is the proper county for trial, citing Code, § 983, subd. 2. Plaintiff resides in Albany County..

The appeal is from an order changing the place of trial to Schenectady.

*J. H. Clute*, for *applt.*

*S. W. Jackson*, for *respts.*

*Held*, That the order was correct. The action is against defendants as successors in office to the parties who it is claimed retained plaintiff. Defendants are sued officially, and so far as the action concerns them it grows solely out of their neglect to take proceedings as Commissioners of Highways to raise the money to pay plaintiff. This charge seems to us to bring the action within subd. 2 of § 983, Code Civ. Pro.

Order affirmed.

Opinion by *Fish, J.*; *Learned, P. J.* concurs; *Landon, J.*, not acting.

### TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*In re* petition of Edmund Waring et al.

Decided Jan. 9, 1885.

E. W. conveyed on Nov. 8, 1876, certain real property to W. E. W., who executed an agreement to convey one-half of the same to S. upon the death of E. W. and equally to the children of S. or the issue of her deceased child or children if she had died leaving issue. Subsequently by an instrument executed March 1<sup>st</sup>, 1881, by E. W., W. E. W. and S., which recited that a previous assignment of certain real and personal property had been made by E. W. to W. E. W. and that a declaration of trust as to the real estate had been

made by the latter, it was agreed that W. E. W. should hold the personal property in trust during the life of E. W., to pay a certain sum annually to him from the income thereof, and to divide the surplus of said income, and the net rents, issues and profits from the real estate previously conveyed to W. E. W. equally between W. E. W. and S. during the life of E. W., and upon his death to divide any surplus income then unpaid and all of the personal property equally between W. E. W. and S. W. E. W. died during the life of E. W., leaving him surviving his wife, to whom he devised all his estate both real and personal. *Held*, That by the instrument executed on March 16, 1881, the whole of the real as well as the personal property was impressed with a trust for the benefit of E. W. and for the benefit of S. and her children, and that upon the death of W. E. W. such trust vested in the Supreme Court.

Appeal from an order of the Special Term, appointing a new trustee.

On Nov. 8, 1876, Edmund Waring conveyed certain real property to William E. Waring and contemporaneously therewith an agreement was executed by both of them by which William E. Waring agreed to convey, upon the death of Edmund Waring, one-half of said real estate to Catharine G. Secor, or, if she had died in the meantime leaving issue, to her children or their descendants taking per stirpes. Afterwards, on March 16, 1881, the said Edmund Waring, William E. Waring and Catharine G. Secor executed another instrument, which recited that certain real and personal property had been theretofore assigned by Edmund Waring to William E. Waring, and that a declaration of trust as to the real estate had been made, and by

which it was agreed that William E. Waring should hold the personal property in trust during the life of Edmund Waring, and upon his death to divide any surplus income then unpaid and all of the personal property equally between William E. Waring and Catharine G. Secor.

William E. Waring died during the life of Edmund Waring, leaving him surviving his wife, to whom he devised and bequeathed all his estate both real and personal. Edmund Waring and Catharine G. Secor thereupon petitioned the court for the appointment of a new trustee, claiming that upon the death of William E. Waring the trust vested in the Supreme Court, and also that such trust embraced all the real estate conveyed by Edmund Waring to William E. Waring on Nov. 8, 1876, as well as the personal property referred to in the last agreement. This application was opposed by the widow of William E. Waring, who claimed that the trust in question devolved upon her and not upon the Supreme Court, and that there was no trust affecting the real estate, or that at most but one-half the real estate was affected by such trust, if any.

*Anderson & Howland*, for aplt.

*A. C. Brown*, for resp't.

*Held*, That the provisions of the instrument of March 16, 1881, when read in connection with those of that of Nov. 8, 1876, seem to show it to have been the manifest intention, that during the life of Edmund Waring the trust should be operative upon the

whole of the real estate as an undivided and indivisible property, and while Edmund lived that trust was intended to be executed according to the manifest desire of the parties.

That if at common law the widow of William E. Waring would have taken the trust as the executrix or representative of her husband, or as sole devisee under his will, that rule has been changed by the statutes of this State, so that the trust, both as to the real and personal property, passed into the hands and under the control of the Supreme Court. 1 R. S., 730, § 68; Banks & Bros. 7 Ed., 3d Vol., 2183, and Chap. 185, Laws of 1882, § 1.

That, notwithstanding the fact that the latter statute was enacted after the creation of the trust, it was applicable to it, for William E. Waring was living at the time of its enactment, and at that time Mrs. Waring had no vested right in the office of trustee, and that her possible right of succession under the common law was not such a vested interest as is protected by the constitution from legislative change.

*Anderson v. Mather*, 44 N. Y., 249, distinguished.

Order affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

#### WILLS.

N. Y. COURT OF APPEALS.

*In re* settlement of accounts of Mahan, exr.

Decided March 3, 1885.

The will of testatrix, after providing that her executor should hold two parcels of real estate in trust to apply the income thereof to the maintenance of her mother and youngest son, or should sell the same and apply the income derived from the proceeds to the same purpose, and that, upon the death of her mother and the coming of age of her youngest son, one of such parcels, or the avails thereof if it should have been sold, should be given to her youngest son, contained the following clause: "And all the rest, residue and remainder of my property and estate I do then give, devise and bequeath to my children John, Thomas, and Mary, the survivor and survivors of them, share and share alike." *Held*, That the right to take the residuum of the estate vested at the time of the death of the testatrix in the three children named.

Affirming S. C., 19 W. Dig., 239.

The petitioner's testatrix died leaving her surviving her mother, one son by her second husband and two sons and one daughter by her first husband. By her will she devised to her executor two houses and lots, in trust, to collect the income and profits, or in his discretion to sell and convey the premises or either of them and receive the proceeds, and therefrom to pay such sums as might be necessary, not to exceed \$40 per month, to her mother as long as she survived, and from the balance such sums as might be necessary for the education and maintenance of her son by her second marriage, and the balance of the income and profits divide equally between her three children by her first marriage, and upon the death of her mother during the minority of her son by her second husband to apply the net income of profits of one of said houses and lots, if unsold, and if sold to apply the net income and

profits of the proceeds or avails thereof for the use of said son until he should attain the age of twenty-one years, and from the death of her mother and upon said son attaining the age of twenty-one years the testatrix provided: "I do give, devise and bequeath the said premises \* \* \* if then unconveyed, or the avails thereof if the same shall then have been conveyed, and all accumulations of the income and profits thereof to my said son James, his heirs, executors and assigns forever; and all the rest, residue and remainder of my estate I do then give, devise and bequeath to my children (naming those by the first husband) the survivor or survivors of them share and share alike."

The will was admitted to probate in 1871, and soon after the real estate was sold by the executor. The son by the second husband became of age in February, 1882, and the mother of the testatrix died in November, 1882. One son of the children by the first husband alone survived. The executor's account showed that of the proceeds of the sale of the two houses and lots there remained in his hands \$12,580. The son who alone survived of the children by the first husband claimed one-half of this amount. The Surrogate directed that such half should be divided into three parts, and one-third paid to said son, one-third to the administratrix of his sister and one-third to the administrator of his brother.

*William J. Kane*, for applt.

*William F. Reilly*, and *Walter B. Burke*, for appls.

*Winthrop Parker*, for resp't.

*Held*, No error; that the limitation of the residue of her estate by the testatrix to her children by her first husband after her mother's death must be deemed to have taken effect as a valid remainder on the death of the testatrix, and the words of survivorship must be held to refer to that event. As the children named survived her at her death they took an interest *in præsent*i in the rents and profits or income of the real estate or its proceeds, and as to the body or residue the *solvendum in futuro* was annexed to its disposition or enjoyment, and not to the bequest. 25 Wend., 144; 29 N. Y., 139; 70 id., 512; 76 id., 133; 89 id., 225.

Judgment of General Term, affirming decree of Surrogate, affirmed.

Opinion by *Danforth J.* All concur.

#### N. Y. STOCK EXCHANGE. PLEDGE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*John H. Morris v. U. S. Grant et al. In re petition of Henry B. Laidlaw.*

Decided Jan. 9, 1885.

The committee on securities of the N. Y. Stock Exchange has no jurisdiction to determine the legality of a tender or delivery of bonds to a purchaser who refuses to receive them upon the ground that the seller cannot convey a good title.

A determination by a committee of the N. Y. Stock Exchange of such a question between members of the Exchange, one of whom is the purchaser of certain bonds from the other, who is a pledgee of the same, and who is selling them to pay his

loan, is not binding upon the pledgor, who is not a member of said Stock Exchange, and has had no notice of the proceedings resulting in such determination nor opportunity to be heard therein. The purchaser of bonds regularly sold by a *bona fide* pledgee of the same has no right to refuse to receive them for the reason that intermediate the sale and the delivery a third party has served a notice upon the pledgee that he claims said bonds upon the ground that they were deposited by him with the pledgor as collateral security for a loan, and that the latter had no authority to pledge them. Such a notice does not prevent the pledgee's conveying a good title upon such sale.

Appeal from an order of the Special Term. The petitioners, who were members of the N. Y. Stock Exchange, loaned \$100,000 to Grant & Ward, who were not such members, and took as security fifty-three \$1,000 bonds of the N. Y., Chicago & St. Louis RR. Co. This loan was not paid, and, thereupon, the bonds in question were sold, at the request of the petitioners, under the rules of the N. Y. Stock Exchange, by the chairman of that organization, for a price more than sufficient to extinguish the loan. Ten of the bonds so sold were delivered at once to the purchaser, but the remainder was not delivered until the following day. On the morning of that day the petitioners received notice that the RR. Co. claimed the bonds in question upon the ground that they had been deposited by said company with Grant & Ward as collateral to a loan made by that firm to the company, and that Grant & Ward had no authority to use them as a pledge for the loan to them made by the petitioners.

The fact of such notice having

been given came to the knowledge of the buyer at the sale after the delivery but before payment therefor, and he, for that reason, objected to receive and pay for the bonds. The question of his obligation to receive and pay was referred for arbitration to the standing committee of the Board of Exchange, known as the "Committee on Securities," and such committee finally determined that the portion of the bonds delivered on the day of the sale was well delivered and must be paid for, the delivery having been made before the receipt of the notice from the RR. Co., but that the portion delivered on the next day might be returned and payment refused. The petitioners, thereupon, received back the latter bonds, and, a receiver of the estate of Grant & Ward having been appointed in this action in the meanwhile, brought these proceedings for leave to sell such bonds with a view to charge said receiver with any deficiency which might arise on the sale.

*Wm. B. Hornblower*, for applt.

*Anson Maltby*, for the petitioners, respts.

*Held*, That the petitioners established no right to the relief prayed for.

First. Because under the constitution of the Board of Exchange the Committee on Securities had no jurisdiction of the question referred to them. Cons. N. Y. Stock Exchange, Art. IV.

Second. Because Grant & Ward had no notice of the supposed arbitration and no opportunity to be



heard thereon, and, not being members of the Stock Exchange, were not bound by such arbitration.

Thirdly. Because, if the dealings of Grant & Ward in regard to the loan could be construed to subject them to the rules of the Exchange in relation to the sale and delivery of their collaterals, that could go no further than to hold them bound by adjudication made by committees clothed with jurisdiction by such rules.

Fourthly. Because the petitioners were *bona fide* holders for value of the bonds under the pledge, and could convey a good title to the purchaser, and no claimant, on such grounds as were named in the notice served, could prevent the vesting of a good title in the buyers, and that it was the duty of the petitioners to have disregarded such notice and to have enforced the sale.

Order reversed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, JJ.*, concur.

### FORECLOSURE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Louis A. Wagner v. John Hodge et al.

Decided Jan. 28, 1885.

When a mortgage describes the property mortgaged as being situated easterly of a certain point when in fact it is situated westerly of said point, but also contains a further description of said property by a certain lot number on a map filed in the Register's office by which said property is accurately located, a purchaser at the sale on the foreclosure of the said mortgage acquires title to the property.

When a mortgagor has, subsequent to the execution of the mortgage, made an assignment for the benefit of his creditors, and his assignee, who has no other interest in the property than that derived under the assignment, is made a party to an action to foreclose the mortgage, individually and not as assignee, the judgment in such action will have the effect of cutting off his interest as assignee.

In order to make a general assignment for the benefit of creditors effectual and operative as a conveyance of real property in the city of New York, as to subsequent purchasers in good faith of such property from the assignor, it must be recorded as a deed in the office of the Register of Deeds of the county of N. Y., and when such a subsequent purchaser in good faith mortgages such property, a purchaser at the foreclosure sale of such mortgage acquires the title of the mortgagor notwithstanding the fact that he has notice of the assignment.

An assignee in bankruptcy of a mortgagor appointed under the late bankrupt laws subsequent to the commencement of an action for the foreclosure of the mortgage and the filing of a notice of the pendency of such action is a subsequent purchaser or incumbrancer and is not a necessary party to the action.

Appeal from an order denying a motion to relieve the appellant from a purchase made under a judgment in this action for the foreclosure of a mortgage.

The property in question was owned in 1873 by one Schiffer, who mortgaged it to Burbank, who foreclosed the mortgage and bought in the property, and subsequently conveyed it to one Norton, who conveyed it to Nosser, who conveyed it to the defendant. The objections to the title were founded upon alleged defects in the mortgage to Burbank and the action by which it was foreclosed. One of such defects was that, while the property was in fact situated on

76th street *west* of 3d avenue, it was described in the mortgage as being situated *east* of it, and this error was perpetuated throughout the foreclosure proceedings and in the referee's deed. The mortgage and the deed, however, further described the property as Lot No. 13 on a certain map filed in the office of the Register of the county of N. Y., and upon such map the correct location of Lot 13 was stated and given.

*Geo. S. Hamlin*, for applt.

*Lewis Sanders*, for plff.

*Held*, That from the reference made to this map and the map itself the lot was capable of being accurately placed and located notwithstanding the subsequent misdescription of its location by the measurement stated in the mortgage, and that under the authorities enabled the purchaser to acquire the title to the lot under the purchase made by him. 10 N. Y., 509; 94 N. Y., 274.

Another objection to the title was that, subsequent to the execution by Schiffer of the mortgage to Burbank, he had made a general assignment for the benefit of his creditors to one Jacobs, and that Jacobs had been made a party to the action to foreclose said mortgage individually and not as assignee. It appeared that Jacobs had no other interest in the property except such as he had derived from the assignment, and it also appeared that while such assignment had been filed with the County Clerk it had never been recorded in the office of the Register, and that Norton and Nosser

had purchased the property without notice of such assignment.

*Held*, That inasmuch as Jacobs had no interest in the property other than that which he had acquired under the assignment, and what he had was subsequent to and subject to the mortgage, the judgment would probably be entitled to the effect of cutting off all his interest in the property.

73 N. Y., 292; 58 N. Y., 463; 2 Abb. N. C., 238, distinguished.

That to render a general assignment for the benefit of creditors effectual and operative as a conveyance of real property in N. Y. city as to subsequent purchasers in good faith of such property from the assignor, it should be recorded as a deed in the office of the Register of the County of N. Y. Chap. 86, Laws of 1813, §§ 170, 171; 2 Bliss, Olney & Whitney's Laws of the City of N. Y., 1456; 2 R. S., 6th ed., 1152, § 78; 37 How., 249.

That Norton and Nosser, therefore, acquired a legal title to the property notwithstanding the assignment, and since the mortgage foreclosed in this action was given upon such title the purchaser at the foreclosure sale would acquire such title and hold the property free and clear of the incumbrance of the preceding assignment although he himself was previously informed of its existence. 46 Barb., 211; 13 N. Y., 509.

A further objection made to the title was that an assignee in bankruptcy of Schiffer had not been made a party to the Burbank foreclosure. It appeared, however, that such assignee was appointed after

the commencement of the action of foreclosure and the filing of a *lis pendens* therein.

*Held*, That by § 132 of the Code of Procedure, and §§ 1670-1 of the Code of Civ. Pro., an assignee in bankruptcy was to be considered, and was, under such circumstances, a subsequent purchaser or incumbrancer, and was not a necessary party to the action.

Order affirmed.

Opinion by *Daniels, J.; Davis, P.J.*, and *Brady, J.*, concur.

#### CHARTER PARTY. PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William B. Holdsworth, as master and agent for the owners of the British Bark "*Bessie*," *respt.*, v. P. A. De Belaunzaran et al., *appls.*

Decided Jan. 9, 1885.

When by a charter party provision is made for payment of the freight in a particular place and in a particular manner, and the debtor provides the requisite funds at the place named, if the creditor does not accept payment in the manner agreed upon he assumes whatever risk is attendant upon his omission to do so.

By the terms of a charter party a portion of the freight was to be paid at Cadiz in cash. Upon arriving there the master of the vessel, although knowing that the charterer's agent at that place had sufficient moneys of theirs in his hands with which to pay the freight, for convenience in remitting the same to the owners, allowed such agent to undertake to procure a draft for him and forward the same to them, and relied upon the statement of such agent that he had done so without investigation. Such agent did not pro-

cure a good draft, but drew an unauthorized draft on the charterers, having at that time no money in their hands, and such draft when presented was dishonored. *Held*, That an action could not be maintained against the charterers to recover the freight for which the draft was taken.

Appeal from a judgment recovered on the report of a referee.

The defendant chartered the bark "*Bessie*" for a voyage from the U. S. to Cadiz and return. By the terms of the charterparty a portion of the freight was to be paid at Cadiz in cash. On arriving at that port plaintiff reported to P., the agent of defendants and the consignee of the cargo, and delivered the cargo to him. P. collected on the cargo with the knowledge of plaintiff more than sufficient money to pay the freight due the latter. Plaintiff wished to remit to his owners and, instead of receiving his freight in cash, for convenience in so doing, allowed P. to undertake to procure a draft for him and forward the same to his owners, and relied upon his statement that he had done so without investigating its truth. P. did not procure a good draft, but forwarded his own draft upon defendants, which he was not authorized to draw, they having no funds of his in their hands at that time. Such draft was dishonored when presented and plaintiff thereupon commenced this action to recover the freight for which it was drawn.

*S. L. Rives*, for *appls.*

*J. A. Shoudy*, for *respt.*

*Held*, That when by a charter party provision is made for pay-

ment at a particular place and in a particular manner, and the debtor provides the requisite funds at the place named, if the creditor does not accept payment in the manner agreed upon he assumes whatever risk is attendant upon his omission to do so. Abbott on Shipping, 414, 420; McLaughlin on Shipping, 2 Ed., 484; 1 Parsons on Shipping and Admiralty, 305; 1 Maude & Pollock's Merchant Shipping, 387.

That defendants put into the hands of P. as their agent, with the knowledge of plaintiff, the funds with which to discharge their obligations under the charter. That plaintiff had only to demand and receive them. That the act of leaving the money due him in the hands of P. to purchase a draft was solely that of plaintiff voluntarily performed without the knowledge or consent of defendants and that that act transferred the money from the hands of P. as defendants' to his hands as plaintiff's agent and defendants were not liable for the consequences of the fraud by which P. converted such money to his own use. 4 Campbell, 262; 6 B. & C. 160; 45 N. Y., 64.

Judgment reversed and new trial ordered.

Opinions by *Davis, P.J.*, and *Brady, J.*

*Daniels, J.*, dissents upon the ground that while plaintiff had consented to receive such a draft as would remit the freight to his owners he never agreed to and never did accept the draft which P. drew upon defendants, and that there was accordingly no payment made of the freight to plaintiff and

the obligation of defendants for its payment was neither released nor satisfied.

### RAILROADS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Fleckenstein v. The Dry Dock, E. B. & B. RR. Co.*

Decided Feb., 1885.

A street railway company does not possess the exclusive right of way in the streets of a city in the sense that he is a trespasser who undertakes to use its tracks at all, so that the company may hunt him out of the way *ad libitum*.

The railway has the paramount right to move through the street on its tracks, but truckmen have the right to drive across or upon the same and to make general use of the same so long as they do not obstruct the passage of the cars.

What is to be deemed such an *obstruction* is a question dependent on the particular circumstances of each case as it arises.

Appeal from judgment entered on verdict at Circuit.

Action for negligence.

Plaintiff was the driver of a beer wagon. He testified that he stopped to deliver some beer to a customer, leaving his team as close to the curb as was practicable; that he left his wagon to go into the customer's building and found on his return that his team had been moved by some street sweepers, so that his wagon was partially over the track; seeing the approaching car he endeavored to get out of its way, but before he could do so the car struck his wagon with such force as to knock him off and severely injure him. The case was submitted to the jury.

*Held*, That a street-railway company has not the exclusive right of way in the streets of a city in any such sense that a person is a trespasser who undertakes to use its tracks at all, so that they may hunt him out of the way *ad libitum*. That the railway has the paramount right to move through the street *on its tracks*. But truckmen have a right to drive across or upon the tracks, and to make general use of them so long as they do not obstruct the passage of the cars.

What is to be deemed such an *obstruction* must depend upon a variety of circumstances which vary in any specific case, as *e. g.* the crowded condition of the street, snow or ice therein, the width of the street, etc.

Therefore it follows that the propriety of plaintiff's conduct must in part at least depend upon the promptness with which he was getting his truck out of the way, and that would depend on the weight of the load, the strength of his team, etc.—all of them facts. Therefore the first motion to dismiss the complaint was properly denied.

That as there was a plain case of conflict of evidence when the motion was renewed at the end of the case the court properly submitted the case to the jury.

That no matter how disinterested a witness may be the court is not bound to accept his story if there be anything in conflict with it.

Judgment affirmed, with costs.

Opinion by *Pratt, J.; Barnard, P.J., and Dykman, J.*, concur.

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## PRACTICE. GUARDIAN.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Jane M. Simis, *respt.*, v. The New York College of Dentistry, *applt.*

Decided Feb., 1885.

At the time of the commencement of the action the plaintiff was a minor, but she became of age prior to the trial thereof. No guardian was ever appointed. *Held*, That such omission did not affect the jurisdiction of the court; that such omission at the time of the commencement of the action was an irregularity merely, which was waived by defendant's pleading to the merits, and that when plaintiff obtained her majority the necessity for a guardian had ceased to exist.

Appeal from a judgment entered on the verdict of a jury at Circuit.

At the time of the commencement of this action plaintiff was a minor, but she became of age prior to the trial of the case. No guardian was appointed.

*J. L. Overfield*, for *respt.*

*M. Walsh*, for *applt.*

*Held*, That the omission to have a guardian appointed did not affect the jurisdiction of the court. That such omission at the time of the commencement of the action was an irregularity merely. That by pleading to the merits this irregularity was waived. That when the plaintiff attained her majority the necessity for a guardian ceased. 14 Hun, 276; 9 Bosw., 639. That plaintiff must therefore be regarded as *rectus in curia*.

Judgment affirmed.

Opinion by *Pratt, J.; Barnard, P.J., and Dykman, J.*, concur.

# JUSTICE'S COURT. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Alphonse Oatman, *respt.*, v. George Schmidt, *applt.*,

Decided Feb., 1885.

In an action in a Justice's Court a demurrer to a sworn complaint was overruled with leave to answer. Defendant failed to answer, and thereupon the justice without any proof of plaintiff's claim entered judgment for the full amount claimed. On an appeal from the judgment of the County Court affirming the judgment, *Held*, Error; that plaintiff ought to have proven his claim, and that until then no judgment should have been rendered in his favor.

Appeal from judgment of County Court, affirming judgment of Justice's Court.

The action was commenced in a justice's court by the service of a summons and a sworn complaint on defendant. To this defendant demurred on the ground that two causes of action were improperly united. The justice overruled the demurrer with leave to answer. Defendant failed to answer; and thereupon the justice, without any proof as to plaintiff's claim rendered judgment for the full amount claimed in the complaint, which was affirmed in the County Court.

*C. L. Brower*, for *respt.*

*J. Hess*, for *applt.*

*Held*, That § 2871 of the Code of Civil Procedure is not repealed by Ch. 414, Laws of 1881, and must be read in connection with § 3 of said Chapter and such construction given that both should stand if that be possible.

That inasmuch as defendant demurred this case is governed by the provision of the Code, and it was incumbent on plaintiff to prove his claim, inasmuch as the Legislature has said that plaintiff must prove his case *in all cases* except those stated in the said Act of 1881. Aside from this, however, this action did not come within the purview of the Act of 1881 as one solely arising on a contract for the recovery of money only or on an account.

Judgment reversed, with costs.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs. *Barnard, P.J.*, thinks the claim came within the actions described in the Act of 1881, and dissents.

# PRACTICE. SERVICE ON AGENT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Palmer v. The Pennsylvania Company.

Decided Feb., 1885.

The provision of the Code regarding a service upon an agent, stating that such an one must be "managing agent," does not mean that he must have charge of the whole business of the corporation.

The statute is satisfied if such an one be a managing agent to any extent.

Every object of the service is attained when the agent is of sufficient character and rank to make it reasonably certain that the defendant will be apprized of the service made.

Appeal from an order.

*Grant B. Taylor*, for *respt.*

*R. F. Wilkinson*, for *applt.*

*Held*, The provision of the Code that the person upon whom the service is made must be "manag-

ing agent" does not mean that the agent must have charge of the whole business of the corporation.

Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprized of the service made. The statute is satisfied if he be a managing agent to any extent.

Order affirmed with costs.

Opinion by *Pratt, J.*

## MASTER AND SERVANT.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

John Belford, *applt.*, v. The Camden Shipping Co., *respt.*

Decided Feb., 1885.

As long as the master keeps the places where the servant is employed, or where he is likely to go in the course of that employment, safe, he discharges his whole duty in that regard. Accordingly, where an employe at the instance of another employe and not in the course of his employment went to a part of a vessel where he had no business or employment and was there injured by falling down an open hatchway, *Held*, that the master was not liable.

Appeal from a judgment entered on an order dismissing the complaint at the close of plaintiff's evidence.

Plaintiff, a carpenter, on January 8th, 1883, was employed in erecting some cattle stalls on the upper or hurricane deck of defendant's steamer. On a certain day after he had stopped work and was about to go home, he met the assistant-engineer of

the steamer and went with him to the main deck to hide away his tools over night. The engineer put them inside the boiler and told him that he would find them there the next morning. At 7 A. M. the next day plaintiff returned to the vessel to continue his work on the hurricane deck, and went to the engine-room on the deck below to get his tools from where they were hidden the night before, and in walking along the lower or main deck fell into a bunker hole, which was then open, and was injured.

*F. A. Ward*, for *applt.*

*Ullo, Reubsamen & Hubbe*, for *respt.*

*Held*, That, inasmuch as plaintiff's work was upon the spar-deck, if he chose to go upon the other parts of the vessel for his own purposes, he went there upon his own risk.

So long as the master kept the places where the workman was employed, or likely to go, in a safe condition, he discharged his whole duty in that regard. See 120 Mass., 306; 10 Allen, 385. It cannot be said that plaintiff was invited or licensed to go forward to the boiler, or that he went there in any connection with the work he was employed to do. There was neither an express or implied invitation by defendant to plaintiff to go where he was injured, and there being no conflict of evidence it became a question of law for the trial judge to determine.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs. *Barnard, P.J.*, dissents.

## AGENT. SET OFF.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Hugh F. McLachlin et al., *respts*,  
v. Jas. E. Brett et al., *appls*.

Decided Jan. 9, 1885.

If a factor sells in his own name as the owner and does not disclose his principal and acts ostensibly as the real and sole owner, the purchaser, if he *bona fide* dealt with the factor as owner, may set off any claim he may have against the factor in answer to an action on the contract brought by the principal, but when the buyer, before the receipt and delivery of the articles purchased, acquires such notice or information of the fact that the factor is not the owner of the goods as indicates the propriety of further inquiry as to their ownership and he fails to make such inquiry he is chargeable with knowledge of such facts as the inquiry would have disclosed and he cannot set up a claim against the factor in answer to an action brought by the principal.

Appeal from a judgment entered upon the verdict of a jury and from an order denying a motion for a new trial.

This action was brought to recover a balance claimed to be due upon a sale of lumber made by the plaintiffs to the defendants, made through the agency of a firm known as Hall & Co., of Montreal. The defence was that defendants had dealt with Hall & Co. as the principals in the transaction, and that Hall & Co. was indebted to defendants in a sum exceeding the balance of the purchase price of the lumber. It appeared that in their previous dealings with the defendants Hall & Co. had not disclosed their agency and that the defendants had dealt with them supposing them to be principals,

but that about the time of the transaction in question Hall & Co. had failed and attachments were being issued against their property in N. Y., and the defendants were informed by one of said firm that thereafter they would ship the lumber as agents to prevent its being attached and prevent any trouble, and also before the delivery of the lumber, the purchase price of which was sued for, the defendants received a letter from Hall & Co. containing the following statement: "As this lumber is sold by us on commission of course it will do those attaching no good. To save annoyance we have made enclosed papers shipped by us as agents." And in the bills of lading the statement was made that the lumber had been shipped by "Hall & Co., agents."

Joseph W. Howe, for *appls*.

A. J. Vanderpoel and Edward C. James, for *respts*.

*Held*, That if a factor sells in his own name as the owner and does not disclose his principal and acts ostensibly as the real and sole owner, the purchaser, if he *bona fide* dealt with the factor as owner, may set off any claim he may have against the factor in answer to an action on the contract brought by the principal. 2 Kent Com., 7th Ed., 81; 24 Wend., 458; 89 N. Y., 571; 35 Maryland, 396; 7 Bos., 339; 3 E. D. Smith, 71; 7 Cush., 371.

But that the defendants had been so far informed of the fact that Hall & Co. were not the owners of the lumber before its delivery to them and its receipt by them as to render it their duty to inquire who



did own it, and, failing to do so, they were chargeable with the information they would have acquired if they had pursued that inquiry. That the information in this respect was unequivocal and could have been attended with but one result and that was the unmistakable inference that Hall & Co. were not the owners of the lumber, and that prevented the defendants from making use of their debt against Hall & Co. as a set off or counterclaim in the action.

That the notice or information necessary to produce such a result is sufficient when it indicates the propriety of further inquiry as to the facts which may be supposed from it to have an existence. 24 Wend., 458; 89 N. Y., 571; 26 How., 513.

Judgment and order affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.*, concur.

#### ORDER OF ARREST.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Frederick J. Richters et al.,  
*respts.*, v. Geo. M. Littell et al.,  
*appls.*

Decided Jan. 28, 1885.

An order of arrest for false and fraudulent representations should not be granted upon an affidavit in which the falsity of the representation is alleged upon information derived from a person named when it does not appear that an affidavit could not be obtained from such person.

Appeal from an order denying an application to vacate an order of arrest.

The defendants purchased 300 cases of salmon in plaintiffs' names

and sold the same as their agents. The plaintiffs were sued for the purchase price, and, upon applying to the defendants for money to pay the same, were informed by them that the salmon had been sold on a credit of 60 days and that the bills were not yet due, and they were induced by such representation to pay a part of the purchase price of the salmon and endorse the defendants' note for the remainder, which note the defendants represented they would pay from the proceeds of the salmon when the bills came due. The defendants failed to pay this note, however, and the plaintiffs were obliged to pay the same, and thereafter they brought this action to recover the money paid for the salmon and obtained an order of arrest upon the ground that the representation of the defendants that the salmon had been sold upon a credit of 60 days and that the bills for the same were not due was false; but that, on the contrary, the salmon had been sold for cash which had been received by the defendants. The falsity of this representation was alleged in the affidavit upon which the order of arrest was granted upon information obtained from one M., who had been the bookkeeper of the defendants at the time of the sale of said salmon. It did not appear that any application had been made to M. for an affidavit upon the subject or that there was any reason why such an affidavit could not be procured from him.

*D. More*, for applt.

*M. Niles*, for resp't.

*Held*, That this was a fatal de-

fect in the proceeding. 78 N. Y., 258; 44 N. Y., 274.

Order reversed and order of arrest vacated.

Opinion by *Brady, J.*; *Davis P. J.*, concurs.

### TORT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Stephen S. Delong v. Reuben S. Curtiss et al.

Decided Jan., 1885.

A release of one joint tortfeasor, on satisfaction by him, operates as a discharge of all the wrong doers.

Action for damages sustained by plaintiff by the flooding of his quarry by reason of water setting back in consequence of a dam built and maintained by F. and others. Plaintiff had taken satisfaction from the latter named persons and had given to F. a release under seal "reserving and excepting all claims I have against any and all the persons interested in the same dam."

The court ordered a verdict for defendants subject to the opinion of this court, whereupon plaintiff made a case and exceptions and moved to set it aside.

*M. Bullard*, for motion.

*Porter & Walts* and *G. S. Hooker*, for defts.

*Held*, That the verdict was right. Satisfaction of damages sustained by plaintiff by one tortfeasor or trespasser was satisfaction as to all the wrong doers. A release of one upon satisfaction by that one operates as a discharge of all the wrong doers. 25 Hun, 543. See

also 45 N. Y., 628; 17 Wall 2, and cases cited. One satisfaction for damages sustained by a wrongful act is all plaintiff is entitled to receive. 8 Cow., 111.

Motion denied and judgment ordered for defendants on verdict.

Opinion by *Hardin, P. J.*; *Boardman* and *Follett, J. J.* concur.

### APPEAL. CONVERSION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Alfred S. Bates, *respt.*, v. William J. Riordan, *applt.*

Decided Feb., 1885.

An appeal from a judgment entered upon a verdict of jury raises questions of law only.

The only mode of reviewing the facts in such a case is by an appeal from an order granting or refusing a new trial.

Plaintiff's horse was stolen. Defendant about the same time purchased a horse from one W. There being evidence enough to submit the question of the identity of the horse to the jury, they found that defendant had purchased plaintiff's horse. *Held*, That defendant was guilty of a conversion even if the purchase were innocently made by him.

Appeal from a judgment entered on verdict in favor of plaintiff.

Action for conversion.

Plaintiff's horse had been stolen, and about the same time defendant purchased from a man named Watson a horse, wagon and harness for \$75. The question was, did defendant purchase plaintiff's horse. Two witnesses for plaintiff testified that when shown the description of plaintiff's horse defendant admitted that that was the animal he purchased. There was

no motion at the Circuit or Special Term for a new trial.

*H. W. Bates*, for respt.

*J. Oliver*, for applt.

*Held*, That an appeal from the judgment raises questions of law only. Code Civ. Proc., § 1346, subd. 2.

That the only mode of reviewing the facts in a case tried before a jury is by an appeal from an order granting or refusing a new trial. 61 N. Y., 236.

Yet on the merits the verdict was right. Plaintiff never lost title, and defendant was guilty of a conversion. No demand was necessary, nor was it essential to prove that defendant's act was criminal, for even if his purchase was innocently made he was liable.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, concurs.

#### CORPORATIONS. NEGLIGENCE.

#### N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Fred. E. Hubbell, guardian *ad litem* respt., v. The City of Yonkers, applt.

Decided Feb., 1885.

Negligence is not to be predicated upon error in a plan adopted by a municipal corporation for making public improvements under its charter.

Plaintiff sued for damages caused by his horse, after taking fright at a bicycle, jumping over an embankment near defendant's road which was not fenced in.

*Held*, That in the absence of any proof that the want of a railing was the primary cause of the injury defendant in any event could not recover.

Appeal from judgment entered on verdict.

Plaintiff was driving along a street in Yonkers when he met a bicycle, at which the horse became so frightened that the driver lost control of him, and while so frightened the horse left the roadbed, stepped over the gutter and curb and over an embankment, carrying plaintiff with him. It appeared that the street was a highway built by the city according to plans and specifications adopted by the Common Council, which did not provide for a railing at the point where the horse went over the embankment. The carriage road is 30 feet wide and each sidewalk 10 feet wide. Between the carriage way and the sidewalk there was a curb and gutter; the curb is 8 inches high and the carriage way was macadamized and in good condition. There was no claim that the runaway or the injury was caused by any defect in the carriage way. The embankment was about twelve feet high and no railing or guard had ever been erected on the sides thereof. Plaintiff was an infant and sued by guardian appointed by the City Judge of Yonkers to commence an action in the Supreme Court.

*Held*, That the appointment of a guardian by the said Court was valid, but that in any event it was unnecessary to pass upon the question, for even assuming that the appointment was not within the power of said Court, the judgment is not impaired or affected thereby, and the Court can now direct the appointment of a guar-

dian *ad litem* without prejudice to the proceedings already had.

That as the charter of defendant seems to impose the duty upon the city of putting up railings and guards at dangerous and exposed places in the public streets and the jury has found that this place where the accident took place was dangerous and exposed and that it was the duty of defendant to guard the same, the question to be determined is whether there was any evidence in the case to submit to the jury from which such an inference could be shown.

The adoption of the plan of the street was a legislative or *quasi* judicial act on the part of the Common Council, and involved a determination as to its necessity, requisite capacity and what protection was necessary to those using it, and for a defective plan or an erroneous estimate of the public needs no civil action can be maintained.

It is not for a jury to say that defendant shall be held liable for the failure of the Common Council to give the public more complete protection.

Negligence is not to be predicated upon error in a plan adopted by a municipal corporation for making public improvements under its charter. 50 N. Y., 236; 91 N. Y., 67; 37 Mich., 52.

Inasmuch as plaintiff failed to introduce any proof that the want of a railing was the primary cause of his injury he cannot recover. The law looks only at proximate cause, and the fact that the accident happened to occur at a point

where there was a defect does not warrant the inference that it would not have occurred but for the existence of such defect. 51 Maine, 127; 97 Mass., 258, 266; 73 N. Y., 368.

Judgment reversed and new trial granted, with costs to abide the event.

Opinion by *Pratt, J.*; *Barnard, P.J.*, concurs; *Dykman, J.*, dissents.

## FRAUD. DAMAGES.

### N. Y. COURT OF APPEALS.

*McMillan, applt., v. Arthur, respt.*

Decided Jan. 27, 1885.

Where defendant offered as a friendly act to purchase certain stock for plaintiff, representing that it could be bought for less than it was worth, but by arrangement with the vendor paid less than the price authorized by plaintiff and retained the balance, *Held*, That plaintiff could not rescind the transaction and recover back the amount entrusted to defendant, but could only recover the excess over the price paid.

The complaint in this action alleged in substance that in 1872 defendant solicited plaintiff to purchase certain shares of the capital stock of a corporation, representing that said stock could be bought for less than it was worth; that he, defendant, had no interest in the sale, but would make the purchase out of friendship for plaintiff. The latter employed him to purchase 350 shares of the stock at \$8.00 per share; defendant under an arrangement with the vendor paid a less sum, viz., \$5 per share and retained the balance

himself. Plaintiff on discovering the fraud tendered the certificates of the stock to defendant and demanded the amount paid defendant with which to make the purchase. Judgment was demanded for such amount.

*W. J. Butler*, for applt.

*David J. H. Willcox*, for respt.

*Held*, That plaintiff was only entitled to recover the damages sustained by him by reason of defendant's fraud, viz., the excess over the price paid.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Ruger*, Ch. J. All concur.

## MURDER. PRACTICE.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Mills, *applt.*

Decided Feb. 10, 1885.

Where the court has charged the jury as to what constitutes insanity it is not error to refuse to charge that if the jury find that defendant at the time the offense was committed was suffering from *delirium tremens* or any other species of insanity they must acquit.

A request to charge that if in consequence of some disease defendant had not sufficient use of his reason to control the passions which prompted the act the jury must acquit, is erroneous as excluding the question of his capacity to distinguish between right and wrong.

A refusal to charge that intoxication absolutely tends to show absence of premeditation and deliberation is correct.

The appellant was indicted for murder. Upon the trial it appeared that at times he indulged in the excessive use of intoxicating liquors, and that after the homicide

while confined in jail he had an attack of *delirium tremens*. The court charged in substance that the jury should acquit if they were satisfied that defendant was suffering from any species of insanity which prevented his distinguishing between right and wrong, or acting from deliberation or premeditation. Defendant's counsel then requested the court to charge: "that if the jury are satisfied that at the time the alleged act was committed the defendant was suffering from the effects of *delirium tremens* or any other species of insanity, they must acquit."

This request was refused, the court stating that it had already charged what constituted insanity.

*Mark D. Wilber*, for applt.

*James D. Ridgway*, District Attorney, for respts.

*Held*, No error.

Defendant's counsel also requested the court to charge "that if in consequence of some disease the defendant had not sufficient use of his reason to control the passions which prompted the act complained of, the jury must acquit." The court replied: "If a man is sane he is bound to control his passions and is held responsible for any acts he may commit under their exercise; if he is insane he is not responsible."

*Held*, No error; that the request was sufficiently answered by the charges made. Also held, that the request was erroneous in excluding entirely the consideration of the question as to the capacity of the defendant to distinguish between right and wrong.

Section 22 of the Penal Code, which provides that whenever the existence of any particular purpose, motive or intent is a necessary element to constitute a crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act, makes it the duty of the court to leave it to the jury to take into consideration the question of intoxication in determining the motive and intent.

The court was requested to charge that intoxication absolutely tends to show absence of premeditation and deliberation. This request was refused.

*Held*, No error.

It was claimed that the court erred in respect to certain portions of the charge to which no exceptions were taken.

*Held*, Untenable; that this court is confined in its jurisdiction strictly to a review of questions of law which appear upon the record. 92 N. Y., 563.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Miller, J.* All concur, except *Rapallo* and *Andrews, JJ.*, not voting.

#### NEGLIGENCE.

##### N. Y. COURT OF APPEALS.

*Debevoise, applt.*, v. *The N. Y., L. E. & W. RR. Co.*, *respt.*

Decided March 3, 1885.

An action cannot be maintained by per-

sonal representatives to recover damages for negligently causing the death of their intestate where the injuries causing the death were received in another state, in the absence of proof that any statute authorizing such an action existed in such state. Our statute has no extra territorial effect.

In such an action it is not necessary for the answer to allege that the death occurred in another state or the non-existence in that state of a statute authorizing the action.

This action was brought to recover damages for negligently causing the death of D., plaintiff's intestate, a brakeman in defendant's service. The complaint alleged and it was proved on the trial that the death was caused in the State of New Jersey. At the close of plaintiff's evidence and again at the close of the evidence on both sides, defendant moved for a non-suit on the ground, among others, that the statute of this State, under which the action was brought, does not apply. This motion was granted.

*John W. Lyon*, for applt.

*Lewis E. Carr*, for respt.

*Held*, No error; that the right of action depends entirely upon statute law. In the absence of proof that the common law of New Jersey had been changed or that any statute existed there authorizing such an action to be maintained its existence cannot be inferred or presumed. Our statute has no extra territorial effect. 23 N. Y., 465; 77 id., 546; 84 id., 48.

*Also held*, That it was not necessary for defendant to allege in its answer that the death occurred in New Jersey and that there was no statute there authorizing the

maintenance of the action. Plaintiff was bound to show both by his complaint and proofs that he had the right upon the law and the facts to maintain his action.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

### SPECIFIC PERFORMANCE. TAX.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Rhoda Ann Van Bromer, *respt.*,  
v. Jacob Shaffer, *applt.*

Decided Jan., 1885.

A contract for the sale of land provided that the vendee should pay all taxes and assessments to be laid or assessed on the premises during the time he was in possession under the contract. He took possession in September. Thereafter, in December, the Supervisors levied the tax and issued their warrant for its collection. The vendee neglected to pay, allowed the premises to be sold for non-payment, and after the purchaser received his deed arranged with him for a surrender of a portion. *Held*, That the tax was laid after the vendee took possession, and that specific performance of the contract should be decreed.

Appeal from judgment in favor of plaintiff, entered upon decision of Special Term.

Action for specific performance of a contract for the sale of land. On the 27th of August, 1879, plaintiff entered into a contract for the sale of the premises to defendant. The contract did not state when possession should be given, but contained a provision that "the party of the second part agrees to pay all taxes and assessments that

shall be paid (laid) or assessed on said premises during the time he shall have possession under this agreement."

September 29, 1879, defendant wrote plaintiff a letter, in which he says: "On receiving your first letter I took possession of the place, and have been to work there since. I think if you would see it now you would say I have made an improvement. I will live up to the contract with you in every respect." Defendant, on the trial, testified that he went up there and mowed a few berry bushes down, and slicked it up considerably, and subsequently said he did nothing upon the place, and took no possession of it until March, 1880. The trial judge found that defendant "took possession prior to Sept. 27, 1879, and has ever since retained possession."

The Supervisors issued a warrant Dec. 19, 1879, for the collection of taxes. The tax on the premises in question was returned uncollected, and the premises were sold for such taxes Sept. 3, 1880, to one W. After W. received his deed defendant arranged with him for a surrender of a portion of the premises.

*Bentley & Jones*, for *applt.*

*Kennedy & Tracy*, for *respt.*

*Held*, That the evidence warranted the finding. That it was the duty of defendant to pay the taxes assessed in 1879. It was the tax of 1879 that led to the sale, and but for the omission of payment of the tax in 1879 the sale to W. would not have been made. Defendant ought not to escape performance of his contract because

he omitted to pay taxes and assessments of 1879, as by his contract he was bound to pay them. The taxes of 1879 were laid upon or assessed to the land after defendant took possession. 63 N. Y., 399; 29 Hun, 485.

Defendant had it in his power to redeem from the tax sale by paying \$14.13, but he did not exercise that option, but waited until a deed passed to W., and then arranged with him for a surrender and release by W. of such portion of the premises as he desired. It is not too much to assume that defendant voluntarily chose that mode of redemption, and he is still in possession of the premises under the contract with plaintiff. Surely, he ought in justice to complete his payments, and in default thereof his interest in the premises should be sold.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Follett, J.*, concurs; *Boardman, J.*, concurs in result.

## WILLS.

### N. Y. COURT OF APPEALS.

*In re will of Phillips.*

Decided March 3, 1885.

The will in question was in testator's handwriting, and contained no attestation clause. One of the witnesses testified to facts showing the will to have been properly executed. The other testified that testator told him that he had a paper he desired him to witness, and while witness was signing his name told him it was his will and asked him to sign as witness; that witness advised testator to have it redrawn, on account of informality, and testator replied he had no fears of it; that

witness then finished his signature. *Held*, That the evidence was sufficient to authorize a finding that there was a complete execution and attestation of the will.

This was a proceeding under § 2647 of the Code of Civil Procedure to revoke the probate of the last will and testament of P. It appeared that the will in question was drawn by the testator and, with his signature and those of the witnesses, covered a single page. There was no attestation clause, but on the left side of the page, and below the testator's signature, was a space evidently intended for the signatures of the witnesses, inclosed in a bracket, opposite the centre of which was written in the testator's hand the word "witnesses." Only two of the witnesses were examined. The testimony of one of these witnesses was sufficient to authorize a finding that the will had been properly executed. B., the other witness, was a practicing attorney. He was well acquainted with the testator and knew his handwriting. He testified that while in his office engaged in writing the testator entered, said he had a paper he desired him to witness, and thereupon produced the will and laid it upon the table before B. While he was signing it the testator told him it was his last will and testament and that he desired him to sign his name as a witness; that B. then stopped, told the testator that the will was informally drawn and advised him to have it re-drawn, the principal objection being it had no attestation clause. Testator said he had no fears of it, having drawn it



himself from the will of some other person whom he named. The witness then swore he finished his signature after the testator stopped talking, he having told him what the instrument was, and having already signed it himself, and that after appending his name to the will the testator, after some further conversation, left the room. On B's cross-examination he was questioned why he had not added his place of residence to his signature, and an effort was made to show that he did not regard the attestation as concluded, and had the impression that on account of the criticisms he had made the testator intended to have the will re-drawn. The testimony on this point was not clear, and the Surrogate found as matter of fact that after the will had been attested by the other witness the testator took the will to the office of B., and having produced it laid it in front of B. on the table, his signature being visible, told B. it was his last will and testament and that he wanted him to sign his name as a witness, and that B. then and there subscribed his name as a witness to said will, and with the intention of becoming an attesting witness thereto, in the testator's presence. The Surrogate refused to find as requested that when the testator took the will to B's office he did not regard it as a completed will, or that B. did not then think the testator regarded it as an executed will, but supposed that he intended to have it re-drawn.

*Samuel Hand*, for applt.

*Isaac D. Garfield*, for respt.

*Held*, No error; the evidence was sufficient to authorize the Surrogate to find that there was a complete execution and attestation of the will.

Order of General Term, affirming order refusing to revoke probate of will, affirmed.

Opinion by *Rapallo, J.* All concur, except *Ruger, Ch. J.*, not voting.

## CONSTITUTIONAL LAW.

### N. Y. COURT OF APPEALS.

*In re* application of Jacobs.

Decided Jan. 20, 1885.

Chap. 272, Laws of 1884, prohibiting the manufacture of cigars in certain classes of tenement houses in certain cities, is unconstitutional.

Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.

A declaration in the title or in the body of an act that it is intended for the improvement of the public health does not conclude the courts.

Affirming S. C., 19 W. Dig., 538.

The petitioner J. was arrested May 14, 1884, on a warrant issued by a police justice in the city of New York, under Chapter 272 of the Laws of 1884, passed May 12th, entitled "An act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases, and regulating the use of tenement houses in certain cases." J. applied for a writ of *habeas corpus*, which was granted, and on the return thereof an order was made dismissing the writ and remanding him to

prison. This order was reversed on appeal, on the ground that the act of 1884 is unconstitutional. The act in question provides: "Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor in any tenement house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein.

§ 2. Any house, building or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement house within the meaning of this act. \* \* "

Section 3 exempts the first floor on which there is a store for the sale of cigars and tobacco from the provisions of § 1.

Section 5 declares every person guilty of a violation of the act, or of having caused another to violate it, guilty of a misdemeanor and punishable with fine or imprisonment, or both.

*Peter B. Olney*, District Att'y, for applt.

*Wm. M. Evarts*, *A. J. Dittenhoeffer* and *Morris S. Wise*, for resp't.

*Held*, That the act of 1884 is unconstitutional; that it deprives the owner or tenant of the property of his property and of some portion of his personal liberty. 12 Wheat., 419; 13 Wall., 177; 13 N. Y., 378, 398; 90 N. Y., 48; 111 U. S., 746; 1 Abb., N. S., 398; 74 N. Y., 515.

In its exercise of the police power the legislature must respect the rights guaranteed the citizen by the Constitution. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of the citizen, or interferes with his personal liberty, the courts may scrutinize the act and see whether it relates to and is convenient and appropriate to promote the public health. A declaration in the title to the act or in its body that it is intended for the improvement of the public health does not conclude the courts. 72 N. Y., 1; 70 Ill., 181; 64 N. Y., 91; 74 id., 183; 96 id., 387; 35 id., 302; 39 id., 171; 66 id., 569; 96 id., 42; 4 Wheat., 421; 8 Wall., 603; 12 id., 457; 110 U. S., 421; 1 Ann. of Cong., 1848; 1 Cranch, 137.

When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with constitutional liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end.

Order of General Term, reversing order of Special Term dismissing writ of *habeas corpus*, affirmed.

Opinion by *Earl, J.* All concur.

## NEGLIGENCE. PRACTICE.

## N. Y. COURT OF APPEALS.

Tolman, admrx., *respt.*, v. The Syracuse, B. & N. Y. RR. Co., *applt.*

Decided Feb. 10, 1885.

If the surrounding facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, the inference of negligence is the only one left to be drawn and a nonsuit should be granted.

This action was brought to recover damages for the death of T., plaintiff's intestate, alleged to have been caused by the negligence of defendant. It appeared that T. was a farmer residing within a few miles of Syracuse; that the highway between his farm and the city, which he was in the habit of constantly traveling over, was crossed by defendant's tracks; that on the night of the first of December, while going from said city to his home, an engine attached to a train on defendant's road struck the sleigh in which he was riding while crossing defendant's track and he was killed. The road was crossed by the track at an acute angle, and an approaching train was visible for more than half a mile from the crossing. The horse driven by T. was quiet and kind, and easily controlled, and the approach to the crossing was quite bare of snow, compelling a moderate rate of speed. The night was dark and misty, but plaintiff's witnesses swore that the headlight of the engine and the lights of the cars were

visible for a great enough distance to give adequate warning to one approaching the crossing. There was no one who witnessed the accident. At the close of plaintiff's evidence a motion was made for a nonsuit, on the ground that no negligence on the part of defendant was proved and that plaintiff failed to show that her intestate was free from contributory negligence. The motion was denied.

*Louis Marshall*, for *applt.*

*T. K. Fuller*, for *respt.*

*Held*, Error; that the evidence was not sufficient to make the question of contributory negligence one of fact; that the burden of establishing, either by direct evidence or the drift of surrounding circumstances, that T. was without fault and approached the crossing with prudence and care and senses alert to the possibility of approaching danger rested upon the plaintiff.

If in a case like the present the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury and require a choice between possible but divergent inferences. If, on the other hand, those facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care,

then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, not sitting, and *Danforth, J.*, absent.

#### ANIMALS. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Thomas Caldwell, *applt.*, v. Marcellus Snook, *respt.*

Decided Jan., 1885.

In an action to recover damages for injuries received from defendant's dog, where it appears that the dog had previously bitten other persons and that defendant had notice thereof, evidence as to the peaceable conduct and disposition of the dog is inadmissible.

Appeal from judgment in favor of defendant, entered on verdict, and from order denying motion for a new trial on the minutes.

Action to recover damages for injuries to plaintiff received from a dog owned and kept by defendant, while visiting defendant's house to buy some pears. According to the evidence, nothing occurred at the time which would prevent a recovery.

One of plaintiff's witnesses testified that, some two years before plaintiff was injured, she was bitten on the hand by this dog while she was at work for defendant, and was laid up for two weeks by her injuries, and that she told defendant of it the same day.

Defendant, under objection, was allowed to give evidence to show the quiet, peaceable and harmless habits and character of the dog. One F., who lived a quarter of a mile from defendant and had occasionally observed the dog, was allowed to testify that "there was nothing malicious in his conduct so far as I saw it. \* \* He never undertook to bite anybody or do anything wrong." One B., who said he had known the dog seven or eight years, was asked, "Have you observed the dog's actions on the occasions you have been there?" This was objected to as immaterial; the objection was overruled, and the witness answered that he had, and added, "He has always been friendly enough to me."

*C. H. Sedgwick*, for *applt.*

*Goodell & Nottingham*, for *respt.*

*Held*, That it was error to receive the evidence quoted and other of the same character, and allow it to be considered as defending the acts of the dog in question. 4 Den., 500. By such evidence plaintiff may have been prejudiced; indeed, probably that had a controlling effect with the jury, as they may have thought that if they found the dog had a good character for peaceable conduct that defendant was not liable though he had received notice of his having bitten Miss E., as she testified.

Judgment and order reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P. J.*; *Boardman, J.*, concurs; *Follett, J.*, concurs in result, holding, however, that if a question of fact

had arisen as to whether the dog had bitten plaintiff or others, or whether defendant had notice of the ferocious disposition of the dog, evidence of its peaceable disposition and conduct would have been admissible.

### PRACTICE. RECEIVER. CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

John O. Hoyt v. The Continental Ins. Co., *In re* appeal of H. F. Averill.

Decided Feb., 1885.

The power of this Court to remove its receiver of a corporation and appoint another in his place does not depend on any notice to stockholders who have appeared. The Court can act on its own motion *ex parte*.

Appeal from an order.

*T. & F. Averill*, for applt.

*W. Britton*, for resp't.

*Held*, That the power of this Court to remove its receiver and appoint another in his place did not depend on any notice to the numerous stockholders who had appeared. The Court could act on its own motion *ex parte*, and it would be its duty so to do in any case where it became clearly necessary.

Order affirmed, with costs.

Opinion by *Pratt, J. Dykman, J.*, concurs.

### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Pardee Carpenter, *resp't.*, v. Harriet P. Wood, *applt.*

Vol. 51—No. 7.

Decided Nov., 1884.

An affidavit for an attachment, under Code, § 636, stated that at the time the debt was contracted defendant falsely stated to plaintiff the amount of her indebtedness; that her property was insufficient to pay the true amount of her indebtedness; that she had refused to pay this debt and had stated to plaintiff that she was about to assign her property to relatives whom she owed; that she had discontinued her former business and was not engaged in business. *Held*, That the affidavit was defective and that no attachment should have been issued upon it.

Appeal from order denying motion to vacate attachment granted under Code, §§ 635 and 636. The affidavit upon which the warrant was issued stated that while contracting the debt to plaintiff defendant stated her indebtedness to be only \$1,636; that this was untrue, and done to induce plaintiff to give her credit; that afterwards defendant told plaintiff her indebtedness was \$3,000; that she refused to pay this debt, said she was about to assign her property to certain relatives and friends of hers whom she owed a considerable amount, enough in plaintiff's opinion to absorb the largest part of her property; that defendant's property was only personal, not worth \$3,000; that defendant had discontinued her former business and had no apparent business.

*Isaac B. Patten*, for applt.

*W. C. Daley*, for resp't.

*Held*, That the affidavit was fatally defective. None of its allegations tend to establish the fact that defendant had assigned or was about to assign, dispose of or secrete her property, with intent to defraud her creditors.

If she stated her indebtedness falsely at the time she bought of plaintiff, that might tend to sustain an action of replevin by him as to those particular goods, but would not establish the fact which justifies an action generally against all her goods. Her disposition, or threatened disposition, of her property to her relatives might have been a lawful act, as she claimed to owe them. It would have been otherwise if she had threatened to turn over her property to others whom she did not owe so that plaintiff should get nothing. The rule in cases of this kind is properly laid down in 78 N. Y., 258. It may not be necessary to make out a clear case, but some fact which tends to show the existence of the statutory conditions must be shown.

Order reversed and attachment vacated.

Opinion by *Fish, J.*; *Learned, P.J.*, and *Landon, J.*, concur.

#### GENERAL RAILROAD ACT. COMMISSIONERS' REPORT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In the matter of the petition of the N. Y. Elevated R.R. Co. to acquire title to certain property in the city of N. Y.

Decided March 4, 1885.

When there has been no irregularity in the proceedings taken before commissioners appointed under the General Railroad Act to assess the damages to be awarded for property taken for a railroad their report will be confirmed as of course. The legal and appropriate mode of reviewing and

considering the effect of the evidence, and the proceedings of the commissioners depending upon it and involving the merits of the controversy, is by the appeal provided by § 18 of the same act. The confirmation of the report seems to be a precedent circumstance to the right of review provided for by this appeal, which is not prejudiced in any respect by this confirmation.

When a notice of motion contains a clause stating that, in addition to the relief specified, "such other and further relief as to the court shall seem just" will be applied for, relief may be awarded to such an extent as is warranted by the facts plainly appearing in the papers on both sides.

Motion by the petitioner to set aside the report of commissioners and for the appointment of other commissioners, or such other or further relief as to the court might seem just.

The commissioners were appointed under the General Railroad Act to appraise the compensation to be made to one S. for so much of the privilege, easement or other interest in Front street belonging to him, or appurtenant to land on said street belonging to him, as was taken by the petitioner for its use as an elevated R.R. The commissioners at first made a report in very general terms, and on the application of the petitioner an order was afterwards made requiring them to make a further report setting forth the easements for which they had allowed the damages, and what damages they had allowed and awarded for such easements respectively. They, thereupon, made a further report, which was also objected to as not sufficiently definite or explicit, and consequently this motion was made by the petitioner.

*Henry H. Anderson* and *Wm. H. Hornblower*, for the motion.  
*John E. Parsons*, opposed.

*Held*, That the reports of the commissioners were sufficiently definite to enable the company to secure as intelligent a review of the proceedings and determination of the commissioners as may ordinarily be afforded in proceedings of this description.

That no irregularity appeared to have intervened in any form in what had taken place before the commissioners, and where that is the case the order of confirmation follows upon the presentation of the report of the commissioners as a matter of course. 64 N. Y., 60; § 17, chap. 140, Laws 1850; 10 How., 168, 175.

That the railroad company had not, by its notice, specially asked for such an order, but that under the clause of the notice by which such other or further relief has been applied for as to the court might seem just, relief may be awarded to such an extent as is warranted by the facts plainly appearing in the papers on both sides. 45 N. Y., 468, 476. And that order was plainly warranted by the facts appearing before the court.

That the legal and appropriate method of reviewing and considering the effect of the evidence and the proceedings of the commissioners depending upon it and involving the merits is by the appeal provided by § 18 of the act, to which the confirmation of the report seems to be a precedent circumstance and which is not preju-

diced in any respect by such confirmation.

Ordered accordingly.

Opinions by *Daniels, J.*, and *Davis, P.J.*; *Brady, J.*, concurs.

## ATTACHMENT. BANKS.

### N. Y. COURT OF APPEALS.

*Gibson et al., respts., v. The Nat'l Park Bank, applt.*

Decided Jan. 20, 1885.

Defendant, with knowledge that a railroad company which was a depositor was embarrassed, and that attachments were being issued against it, certified a check of the company for the balance of its deposit, payable to R., its assistant treasurer. An attachment against the company was served on the bank, and thereafter R. deposited the check to his individual account and drew out the proceeds. *Held*, sufficient to sustain a finding that defendant had reason to and did believe when the deposit was made that it was the property of the company; that it was the duty of defendant upon being served with the attachment to take immediate steps to impound the fund in its hands, and prevent payment by any of its agents except to a *bona fide* holder of its obligations.

The service of the attachment did not create a lien on the moneys deposited.

Where the clerk of the deputy signs the certificate under directions from the latter, his act is to all intents and purposes the act of the deputy, and valid.

Where there has been a substitution of parties plaintiff upon the death of one, proof of the facts showing a right to substitute is not necessary upon the trial.

This action was brought to recover an amount claimed to be due the N. O., St. L. & C. RR. Co., upon a deposit account, from the defendant, the National Park Bank. Plaintiffs claimed to have attached this amount in an action

brought by B., one of the original plaintiffs. It appeared that on April 27, 1875, the Nat. Park Bank had on deposit to the credit of said RR. Co. \$6,600, and, at the request of one R., its assistant treasurer and financial agent in New York, and the person who made its deposits, said bank certified a check of said RR. Co. for \$6,600, which was signed by R. as assistant treasurer, and was payable to his order. On April 30, 1875, an attachment was levied upon the deposits of said RR. Co. Subsequently, but on the same day, R., upon being informed of said levy, asked to be allowed to open a deposit account in his own name, and upon his request being granted, he deposited said \$6,600 check and two other checks or drafts, which belonged to said RR. Co., and were payable to him as assistant treasurer and indorsed by him as such. These securities, amounting in the aggregate to \$55,000, were credited to R. individually, and were paid out on his checks drawn to pay debts of said RR. Co.

It appeared that before the \$6,600 check was certified by defendant it knew that the RR. Co. was pecuniarily embarrassed, and that an attachment had already been levied upon its deposits. It also appeared that defendant was aware that other attachments were anticipated, and that defendant had become a party to a scheme by which the funds of the RR. Co. were to be so kept as not to be liable to attachment at the suit of creditors, and that defendant knew that it was the intention of the

RR. Co. to impede its creditors in reaching its deposits.

*George H. Adams*, for respts.

*Francis C. Barlow*, for applt.

*Held*, That the evidence was sufficient to support the finding that defendant had reason to and did believe, when the deposits were made, that they were the property of the RR. Co. The fact that the securities deposited were payable to R., as assistant treasurer of the RR. Co., was notice to everybody into whose hands they might come that the funds represented by them were the property of the RR. Co. and that R. held them in a fiduciary capacity. 91 N. Y., 324; 100 Mass., 389; 5 Wend., 572; 26 How. Pr., 270.

*Also held*, That when defendant's officers had notice of the service of the attachment it was its duty to take immediate steps to impound the funds in its hands and prevent their payment by any of its agents except to a *bona fide* holder of its obligations. It cannot shield itself from liability by alleging the ignorance of the agent making the payment.

Plaintiffs claimed that the service of the attachment gave them a lien upon the moneys deposited, if they were in fact the moneys of the attachment debtor, although they were deposited in the individual name of R.

*Held*, Untenable; that the deposit created no debt from the bank to the attachment debtor which the latter could enforce against the bank; that by the voluntary consent of the owners of the fund deposited the credit in question was



given to R., and the bank thereby became liable to pay the amount to him and to him alone. It was competent for the parties to give such form to the transaction as they desired, subject only to the right of creditors in a proper action to impeach the validity of the contract. Even if the deposit was made for the express purpose of defeating creditors of the RR. Co., the legal title to the debt was in R., and any equitable right existing in favor of the creditors against the RR. Co. could only be enforced through an action in equity, to which R. and the RR. Co. would be necessary parties. 15 N. Y., 334.

It appeared that while the certificate served upon defendant by the deputy sheriff purported to be signed both by the sheriff and the deputy, it had in fact been signed by the clerk of the deputy, under directions from the latter.

*Held*, That the deputy having adopted the act of his clerk in signing the process, it was to all intents and purposes his act, and he would thereafter be estopped from controverting the validity of the signatures. As the act of the clerk was merely mechanical and ministerial, its performance could be lawfully delegated. 3 N. Y., 396; 6 *id.*, 432.

Knowledge, or notice of a fact legitimately communicated to any of the officers of a bank while acting in his capacity as an agent of the bank becomes the knowledge of the bank, and knowledge or notice communicated to the principal which imposes a duty upon it be-

comes by that circumstance the knowledge of all of its agents when acting in an official capacity. 96 N. Y., 550; 2 Hill, 451.

The debtor of a defaulting creditor, whose liability is sought to be attached against such creditor, has an active duty to perform, imposed upon him by the legal attachment of such debts, and cannot escape liability when by inaction he allows the attached fund to be removed from his possession.

It appeared that an order was made in this action substituting one C. as plaintiff in the place of one of the original plaintiffs who had died. No proof was given on the trial of the death of the original plaintiff or the right of C. to be substituted. It is now claimed that such proof is necessary.

*Held*, Untenable; as such facts were adjudicated when the order of substitution was made. 94 N. Y., 519.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Ruger*, *Ch. J.* All concur.

## NEGLIGENCE. RAILROADS.

### N. Y. COMMON PLEAS. GENERAL TERM.

*Ruppel, respt.*, v. The Manhattan R. Co., *applt.*

Decided Nov. 14, 1884.

Where action is brought to recover damages from a fire caused by sparks from defendant's locomotive, it is sufficient to make a *prima facie* case of negligence to show that at the time of the accident the engine emitted a large and unusual quantity of sparks.

Appeal from judgment in favor of plaintiff and from order denying motion for new trial.

The action was for damages for a fire caused by sparks from one of defendant's locomotives. The evidence as to the origin of the fire was as follows :

"I was coming along Third avenue, when my attention was attracted by the puffing of an engine, and the smoke and a volume of sparks arising from the smoke stack. I watched it very closely as it lit upon the awning. I saw a little smoke arising, and all of a sudden it blazed, so I ran right into the store and halloosed to Mr. Ruppel. It was quite a quantity of sparks that arose from the smoke stack. The sparks were unusual in degree, to the best of my knowledge. I am on Third avenue almost every day, from Fifty-fifth street to One Hundred and Twenty-fifth street. I am very careful when I see sparks falling out of the smoke stack. It is not uncommon for smoke to escape from the smoke stack. Fire also often escapes by the puffing of the engine starting so that it causes more fire, and it throws up more of these sparks. I noticed the sparks in large volume at the time she was coming. When the sparks were emitted the smoke stack was not more than twenty-five or thirty feet from Ruppel's restaurant. My attention was first attracted by the sparks. The sparks were red. It was about one o'clock in the afternoon. I cannot say that I ever saw so large a quantity of sparks on any other occasion. I might

have seen them emit a larger quantity of sparks on one or two other occasions. I suppose I have seen locomotives emit sparks on three or four different occasions altogether, before Ruppel's awning was burned. I have seen locomotives a great many times when no sparks were emitted. In the day time you could not notice the red light in such volume, but in the night time it can be seen very plain. What attracted my attention on this occasion was the red sparks blazing from the smoke stack. It was the quantity of sparks that attracted me, as naturally it would. At night I have noticed red sparks on other occasions, but not in the day time."

The sole question brought up by this appeal is, was this evidence sufficient to make out a *prima facie* case of negligence against the defendant?

*R. C. Deyo*, for applt.

*R. Bonyng*, for respt.

*Held*, That though the evidence for the plaintiff is far from conclusive, yet it cannot be said that there is no evidence at all of negligence. We cannot determine in what it consisted—whether in the defective condition of the engine or in the careless management of the engineer; but the jury was warranted in finding that the emission of a volume of live sparks, unusual in quantity and of so brilliant a color that their brightness did not pale before the rays of the midday sun, was so much out of the ordinary course of events that it must have been caused by some force that is seldom in operation.

Our experience and observation teach us that locomotives can be and are constantly operated without setting fire to adjacent property, and when any extraordinary display of sparks is made at the time an engine starts a fire, a jury may, in the absence of all explanation, conclude that there was something wrong with the engine or with the engineer. 32 N. Y., 349; 44 id., 369; 13 Hun, 257; 8 ib., 599; 1 Addison's Torts, 307, n. (Dudley & Baylies' ed.); 59 Barb., 644.

Judgment and order affirmed.

Opinion by *Van Hoesen, J.*; *Lar. ramore, J.*, concurs.

#### COLORED SCHOOLS IN N. Y. CITY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles L. Reason, personally and as principal of Ward School No. 80, etc., *applt.*, v. The Board of Education of the City of N. Y. et al., *respts.*

Decided March 4, 1885.

Chap. 248, Laws of 1884, continuing the colored schools then existing in the City of N. Y., does not prohibit the proper officers from changing the location of one of such schools if such change is for the benefit of the school; but it does prohibit any change which would affect the capacity of the school to receive its pupils, or would degrade the school or destroy its usefulness.

Appeal from an order vacating a temporary injunction.

This action was brought under Chap. 248, Laws of 1884, continuing the colored schools then exist-

ing in the City of N. Y., to restrain the defendants from changing the location of Ward School No. 80 from 41st street to a building on 42d street, which, it was claimed, would be a degradation of the school and to its disadvantage.

A preliminary injunction was obtained by plaintiff, but the motion to continue it was denied and the injunction vacated, and from the order vacating it plaintiff appealed. Upon the argument of such motion plaintiff claimed the right or privilege of answering certain affidavits read in opposition, which was denied, and plaintiff, therefore, procured an order to show cause, returnable before the General Term upon the argument of the appeal, why, if the order appealed from should not be reversed, it should not be sent back to the Special Term for a further hearing upon the merits. The affidavit upon which this order to show cause was obtained contained allegations that the building to which it was proposed to remove the school was not of sufficient capacity to accommodate the scholars.

On the argument of the appeal it was claimed by plaintiff that defendants had no power, under Chap. 248, Laws of 1884, to make the change in the location of the school contemplated.

*Nelson J. Waterbury*, for *applt.*

*D. J. Dean*, for *respts.*

*Held*, That the proposition that the act of 1884, *supra*, by which the school was continued, means in the precise locality in which it was situate at the time of the passage

of the act, and that such location could not be changed, could not be accepted as a proper interpretation. That the whole subject is under the control of the officers appointed or selected by law to manage it, and involves the exercise of discretion, which should not be interfered with except when it plainly appears to have been erroneously employed.

That, however, the act of 1884, *supra*, must be regarded as an authoritative command to preserve the school in full vigor and with capacity to entertain its full complement of scholars, and defendants had no power to degrade the school or destroy its capacity or usefulness.

That in view of the allegations contained in the supplemental affidavit on the part of plaintiff the motion might, perhaps, have been sent back to the Special Term for a further hearing if the location of the school had not in fact been actually changed, but as it was, the order appealed from should be affirmed without prejudice to any other motion which appellant might be advised is material.

Opinion by *Brady, J.*; *Davis, P.J.*, and *Daniels, J.*, concur.

#### CONVERSION. DAMAGES.

N. Y. SUPERIOR COURT. GENERAL TERM.

George B. Boomer, *applt.*, v. John H. Flagler, *respt.*

Decided Jan. 5, 1885.

Defendant was bound to deliver certain

shares of stock, and upon demand duly made, on the day fixed therefor, refused to make delivery. Thereafter he tendered the stock, which had decreased in value, to plaintiff, who accepted it. On the trial, plaintiff's offer to prove such decrease as the measure of damages, was refused, and the jury were instructed that the measure of damage was the interest on the value of the shares from the day of the wrongful refusal to deliver to the day of actual delivery.

*Held*, Error. The measure of damage, if the case be considered a breach of contract, was the difference between the value at the time of refusal and the value at the time of delivery, to be computed by the jury. If it be considered as conversion, it was merely a constructive conversion, and defendant after his refusal could, as he did, deliver the shares, which goes in mitigation of damages.

Appeal by plaintiff from a judgment rendered in his favor, on account of the inadequacy of the verdict.

The case seems to have been regarded upon the trial as one of conversion, founded upon the refusal of the defendant, upon demand, to deliver certain shares of stock. The complaint states the facts out of which the defendant's obligation to deliver the shares arose, and alleges that without just cause the defendant, although the shares were demanded, refused to deliver. The conversion, if any, arose upon the demand and refusal, and was constructive and not actual. The defendant, afterward and before suit brought, changed his mind, and tendered the shares, and they were received. The plaintiff offered to prove on the trial that subsequent to his demand for the shares, and before their delivery, they had fallen in price. This offer was refused, and

an exception was taken. The judge in the end charged the jury that the measure of damages was the interest on the value of the shares from the day of the refusal to deliver, when requested, up to the day of the actual delivery, and fixed the amount.

These rulings gave rise to the only question involved in the plaintiff's appeal.

*J. M. Fisk and W. H. Arnoux*, for applt.

*Sullivan & Cromwell*, for resp't.

*Held*, That the exclusion of the evidence offered, and the rule of damages laid down by the judge was erroneous, in any light in which the action may be viewed, whether it be considered as one on contract, or for a conversion. As one upon contract, the amount of the damages was not one of law, but of fact, and included the loss which the plaintiff had sustained by the breach. That would be the difference between the value of the stock on the day of the demand and refusal, and the value at the time the same was actually delivered, to be computed by the jury.

It is suggested that the plaintiff, after the refusal, could have purchased or sold in the meantime. That is speculative. He was not bound to buy other shares, and he had none to sell, owing to the defendant's refusal.

Regarded as an action for a conversion, the defendant, notwithstanding his refusal at first, could afterwards, as he did, deliver the shares, and such delivery, under the cases, must be taken in mitigation of damages.

Judgment reversed, and new trial ordered with costs to abide the event.

Opinion *per curiam*; *Sedgwick, Ch.J.*, and *Van Vorst, J.*, sitting.

## PARTY WALL. COVENANTS.

### N. Y. COMMON PLEAS. GENERAL TERM.

*J. T. Weeks, exr., v. Samuel McMillan.*

Decided March 13, 1885.

A covenant to contribute to the construction of a party wall when he shall use the same, entered into by an owner of land, for himself, his heirs and assigns, does not run with the land, and is not enforceable against a subsequent grantee of the land, though his deed be by its terms subject to the covenant.

Such grantee, using the wall upon his premises, is not liable in trespass, though he took with knowledge of the agreement and of the fact that the payment had not been made.

Submission of case to General Term.

Plaintiff's testator built a wall on the dividing line of a lot owned by him and the lot adjoining, owned by one Woodruff, with the consent of the latter, one-half upon his own land and one-half upon the land of Woodruff, the two at the same time executing an instrument, under seal, whereby Woodruff, for himself, his heirs and assigns, agreed that when he should use this wall as a party wall he would pay plaintiff's testator \$350. Through several mesne conveyances Woodruff's lot became the property of defendant. All the conveyances were expressly made subject to said agreement, of

which and of the existence of the wall defendant, when he became owner, had full knowledge. This action was brought to recover \$500 as damages for trespass, because defendant in building a house made use of so much of the wall as stands upon his own lot.

*F. W. Hinrichs and W. B. Wetmore*, for plff.

*J. B. Lindley*, for deft.

*Held*, That the case cannot be distinguished from *Scott v. McMillan*, 8 Daly, 320; 76 N. Y., 141. The rights of the parties are not at all changed by calling this an action for trespass. There has been no trespass, however. The agreement is very loosely drawn, and it purports to bind Woodruff, his heirs and assigns, for the acts of Woodruff only. There is no clause in the agreement that binds or purports to bind the grantees of Woodruff to pay for the wall if they should use it. The words are "The party of the second part (Woodruff) for himself, his heirs and assigns, agrees with Frost, his heirs and assigns, that when he (Woodruff) shall use the wall as a party wall or any part of it in any manner, he (Woodruff) will pay to Frost, his heirs and assigns, \$350." The cases of *Cole v. Hughes*, 54 N. Y., 444, and *Scott v. McMillan*, *supra*, show that when McMillan, a remote grantee of Woodruff, used the wall which he found upon his own land, he did not become bound to pay the amount that Woodruff had agreed to pay. McMillan was not liable upon any covenant, express or implied. Nor was he a trespasser in making use

of his own land and its appurtenances, even though he knew that the person entitled to be paid for the building of those appurtenances had not been paid. Under the laws of the State of New York, as expounded by our highest court, McMillan is entitled to judgment in his favor.

Judgment for defendant.

Opinion by *Van Hoesen, J.*; *C. P. Daly, C.J.*, and *Larremore, J.*, concur.

#### ATTACHMENT. FOREIGN CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Thomas H. Adams, *applt.*, v. The Penn Bank of Pittsburgh, *respt.*

Decided March 4, 1885.

A non-resident of the State of New York, even though he is a citizen thereof, cannot maintain an action in the courts of that State against a foreign corporation except in one of the cases specified in § 1780 of the Code of Civ. Pro.

The provisions of the Constitution of the U. S., securing to the citizens of each State all the privileges and immunities of citizens in the several States, entitle the citizen of one State to claim in another State only such privileges and immunities as pertain to citizens of the latter State by reason of their citizenship, and not such privileges, etc., as he would be entitled to in his own State.

Appeal from an order vacating an attachment.

This action was brought by plaintiff, who was a resident of Pennsylvania, against defendant, which was a corporation of that State having its place of business in Pittsburgh, upon a cause of ac-

tion arising upon the failure of defendant to pay back money deposited with it. An attachment was obtained against the property of defendant, and a motion was made to vacate it upon the ground that, under § 1780 of the Code of Civ. Pro., the action could not be maintained by a non-resident. It was argued, in opposition to the motion, that said section was unconstitutional, inasmuch as it contravened § 2 of Art. IV. of the Const. of the U. S., providing that the citizens of each State should be entitled to all privileges and immunities of citizens in the several States.

*A. C. Brown*, for applt.

*Jas. Watson*, for respt.

*Held*, That the provisions of the Constitution of the U. S., *supra*, secure to the citizens of one State in another State only such privileges and immunities as pertain to citizens of the latter State by reason of their citizenship, and not such privileges, etc., as they would be entitled to in their own State, and plaintiff, therefore, did not possess the right to maintain an action against defendant in this State because he might have maintained such an action in the State of Pennsylvania.

That in order, therefore, to entitle him to maintain his action against a foreign corporation, notwithstanding the provisions of the Code to the contrary, he must be able to show that a citizen of this State, circumstanced precisely as he is, could maintain such an action, but that, under § 1780, the right to maintain the action does

not depend upon citizenship but upon residence, and a citizen of this State who is a non-resident cannot, by reason of his citizenship, sue a foreign corporation in our courts except in one of the cases specifically declared by statute. That, as the question is wholly controlled by residence, plaintiff could not maintain this action as it was not one specified in § 1780 of the Code.

Order affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, J.J.*, concur.

#### PARTITION. MORTGAGE. LIMITATION.

N. Y. COURT OF APPEALS.

*Barnard et al., respts., v. Onderdonk, impld., applt.*

Decided Feb. 10, 1885.

Where, in an action for partition, a mortgagee of the premises by answer sets up his mortgage and its foreclosure, and submits his rights to the court and takes part in the trial, he cannot on appeal successfully contend that the court had nothing to do with the validity of his mortgage. A judgment of foreclosure is deemed paid after the lapse of twenty years.

This was an action of partition. O., a holder of a mortgage upon the premises, was made a defendant. The complaint averred that O. claimed a lien on the property which plaintiffs believed to be actually or presumptively paid, and demanded judgment that his lien be ascertained and declared. A co-defendant also put in issue the lien of O.'s mortgage. O. answered, setting out his mortgage and judgment of foreclosure, and denied that the judgment had been paid

or otherwise extinguished, and alleged "that it is now a valid and existing lien on the said premises," and asked that they be declared subject to said judgment, or that said judgment be paid out of the proceeds of the sale if any should be decreed. O. appeared and took part in the trial. An interlocutory judgment was entered adjudging that O.'s mortgage was not a valid lien. This was affirmed by the General Term.

*Esek Cowen*, for applt.

*D. P. Barnard*, for respts.

*Held*, That O. having made his election and having submitted his rights to the court, he cannot on appeal successfully contend that the court had nothing to do with the validity of his mortgage. 85 N. Y., 427.

As to whether O. would have been compelled to submit his rights to the court, *quære*.

The effect of the foreclosure was to fix conclusively the amount due upon the debt; it did not create a new one; the power of the court in the proceeding was limited to a decree for the sale of the mortgaged premises or so much thereof as might be sufficient to discharge the amount due on the mortgage and the costs of the suit. 2 R. S., 191, § 151. The mortgage was not extinguished, and notwithstanding the decree the rights and liabilities of the mortgagor continued under the statute to be measured by the obligations stated in the mortgage until final payment. 2 Johns. Ch., 502; 1 id., 617; 1 Abb. Ct. App. Dec., 242; 10 Paige, 243. The lien is, however, liable to be defeated

by presumption of payment founded upon lapse of time. If the mortgage stands alone without payment or proceedings to enforce it for twenty years the presumption of payment accrues. If by virtue of foreclosure a new security has been taken, the same policy will, under the same circumstances, raise the same presumption. Where no attempt has been made to enforce sale under a decree of foreclosure by a conveyance to the purchaser, or any recognition of the mortgage by the mortgage debtor, after the lapse of twenty years it will be presumed that the land has been redeemed from such sale. 3 Bradw. (Ill.), 173.

After judgment of foreclosure and sale the owner of the equity of redemption executed another mortgage on the premises as collateral to the judgment, which contained a stipulation that an enforcement of the judgment by sale should be stayed ten years.

*Held*, That after the lapse of ten years and twenty years after that a recovery upon the judgment or the new mortgage was barred. 2 R. S., 295, § 90; Code of Proc., § 90; Code of Civil Proc., § 381. A judgment of foreclosure is merely for the purpose of enforcing the lien of the mortgage as by a special execution. It is not for the payment of any sum of money, nor can it be docketed. If after sale there is a deficiency, when other steps have been taken, it may be made a personal judgment. The provisions of the Revised Statutes (2 R. S., 301, § 47) and of § 376 of the Code of Civil Procedure, rais-



ing a presumption of payment after twenty years of a judgment or decree, apply to a foreclosure judgment.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Danforth, J.*; *Miller, Earl* and *Finch, JJ.*, concur; *Ruger, Ch. J.*, *Rapallo* and *Andrews, JJ.*, dissent.

### BREACH OF PROMISE OF MARRIAGE.

N. Y. SUPERIOR COURT. GENERAL TERM.

*Anna B. Crandall, respt.*, v. *William G. Quin, applt.*

Decided Feb. 2, 1885.

In an action for breach of promise of marriage, it appeared that defendant had married another woman, and he was asked how large a fortune his wife had. *Held*, Inadmissible.

Such acts, conduct and declarations of defendant down to the trial, as would, under the facts of the case, have a tendency to limit the damages, may be proved in his behalf in mitigation of damages.

Appeal by defendant from judgment entered on verdict of jury in favor of plaintiff.

The action was for breach of promise of marriage. The defendant, after his promise to marry the plaintiff, married another lady. When he was upon the stand as a witness, plaintiff's counsel asked him: "And your wife had how large a fortune?" Against objection, the question was allowed upon two grounds: first, as showing a tending to show a motive for the defendant's breach of promise, and second, as tending to show the

social and financial condition of the contracting parties.

*Thomas Brennan*, for applt.

*James M. Smith*, for respt.

*Held*, That though motive may be shown, as impelling the parties to do or not to do, the thing in dispute in this case, the fortune of the wife had nothing to do with the promise, and was not necessary to determine the character of any contradictory testimony as to the breach. For the fact of the defendant's marriage was conclusive proof of that. As tending to show the financial condition of the defendant, apart from the consideration that his wife's means would not increase his own property, it was inadmissible. Evidence as to the defendant's property should be confined to general reputation as to the circumstances of defendant. 30 N. Y., 289.

There were several exceptions to the court's refusals to charge that certain acts and declarations of the defendant which the requests assumed occurred after the breach, and were considerate or respectful to the plaintiff, might be taken by the jury in mitigation and reduction of damages, or in estimating the damages, by way of compensation.

*Held*, That on the new trial attention should be given to the opinion in *Thom v. Knapp* (42 N. Y.), that the jury were entitled "to take into consideration all the facts and circumstances of the case, and the conduct of both parties to each other, and particularly the conduct of the defendant in his whole intercourse with and treat-

ment of the plaintiff, in connection with the making and breach of the contract, and afterwards up to and including the defence and trial of the action." This was said in respect of a charge, that the defendant's conduct up to and on the trial might be considered in aggravation of damages. Additional considerations have to be entertained as respects the mitigation of damages by the acts and declarations of the defendant, which do not pertain to any act or declaration given in evidence by the plaintiff to increase the damages. Whatever, of course, determines what the injury was or will be, or tends to show what compensation should be given, or what, if any, should be exemplary damages, is relevant, if it appear to the jury, up to the time of the assessment of damages. If, as matter of fact, anything done by the defendant would tend to show that the damages should not be so great, as from the other facts in the case it might seem to the jury that they should be, it should be allowed in evidence. The point would be to determine that it had such a tendency, under the facts of the particular case. This is to be applied to declarations. It is difficult to imagine that the declarations of defendant, not part of the *res gestæ*, are competent in his own favor, or that it would have any tendency to limit the damages. There may possibly be such a case.

Judgment reversed, new trial ordered, costs to abide the event.

Opinion by *Sedgwick, Ch. J.*; *Truax, J.*, concurs.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

Powers et al., admrs., *respts.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided March 3, 1885.

Plaintiff's intestate was working upon a defective hand car, the handle of which had been broken for two weeks, to the knowledge of the foreman, a crowbar being used in place thereof, which acted irregularly on the walking beam, causing it to break, whereby intestate was precipitated from the car and killed. This happened while he and his coservants were endeavoring to run the car to a distant switch to avoid an approaching train. Deceased had full knowledge of the defect, but made no complaint. *Held*, That by riding on the car and aiding in the use of the crowbar deceased took all risks of injury resulting from its use or the negligence of his fellow servants; that by his neglect to notify his master of the defect he was guilty of contributory negligence.

Reversing S. C., 19 W. Dig., 408.

This action was brought to recover damages for the killing of P., plaintiff's intestate, alleged to have been caused by defendant's negligence. It appeared that P. was an employee on defendant's road; that two or three weeks before he was killed one of the handles to the walking beam of a hand car used on defendant's road was broken; that defendant's employees continued to use the car with the handle of a pick or an iron crowbar which they inserted in the socket of the broken handle, without any direction from the section boss. This crowbar was about five and one-half feet long, and when used as a handle one end projected four feet and the other a foot and a half from the socket of the lever.

On the day of the accident some of the workmen had inserted the crowbar in the place of the handle, and observing an approaching train, instead of removing the hand car to the other track, as was usually done, they started to run it to a distant switch. They worked the car with all the force they could, using five men instead of three, the usual number. Three of them, including P., were on the long arm, one on the short arm, and one in the centre. This evidently wrenched the lever or bearer by which the car was operated so that it broke, throwing P. under the car and killing him. Prior to the accident P. had full knowledge of the defect, and continued in defendant's employ without complaining of or objecting to it.

*E. C. Sprague*, for applt.

*M. E. Bartlett*, for respts.

*Held*, That P., by riding on the hand car and aiding in the use of the crowbar in propelling it, assumed all risks of injury resulting from its use or from the negligence of his fellow servants, without regard to the question whether defendant knew or ought to have known of the defect. 2 Thompson on Negligence, 1008, *et seq.*; 63 N. Y., 453; 88 *id.*, 264; 9 Lea (Tenn.,) 685.

*Lanning v. N. Y. C. & H. R. RR. Co.*, 49 N. Y., 521, distinguished.

The rule that a servant has a right to rely upon his master to protect him from danger and injury by providing suitable machinery and in selecting its agents should not be invoked where it is

entirely apparent that the servant has an intelligent and clear comprehension of the nature of the risks he assumed.

*Also held*, That P., by his neglect, on discovering the defect in the hand car, to notify his master, was guilty of contributory negligence.

*Also held*, That it was negligence to seek to avoid the approaching train in the manner P. and his fellow servants did.

Order of General Term, reversing judgment of nonsuit, reversed, and judgment affirmed.

Opinion by *Miller, J.* All concur.

#### EQUITY. LUNATIC.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Francis E. Johnson, Com'r, *respt.*, v. Andros B. Stone et al., *appls.*

Decided March 4, 1885.

A sale to a lunatic will be set aside by a court of equity, and the return of the consideration adjudged, when the fact of lunacy existing at the time of the sale is established, whether the defendants had or had not knowledge of its existence, except that, where the sale is for the benefit of the lunatic, and the defendants, if they acted in good faith, can not be put in *statu quo*, the sale will be upheld; and allegations in the complaint in an action brought for the purpose of setting aside the sale, that the defendants wrongfully and unlawfully effected such sale, &c., will not change such action from one in equity to one for fraud and deceit.

When the complaint in an action to set aside a sale of stock made to a lunatic charges a joint liability against the defendants for the return of the consideration, but it appears upon the trial that they owned different amounts of the stock sold and received different propor-

tions of the purchase money, a judgment can be entered ordering the return by each defendant of the amount received by him.

Appeal from judgment of the Special Term.

This action was brought by plaintiff as committee of one J., a lunatic, to set aside a sale of stock made by defendants to said lunatic, and for the recovery of the consideration after tendering the return of said stock. The complaint charged that defendants had "wrongfully and unlawfully effected such sale," and had "wrongfully and unlawfully converted the purchase-money to their own use;" but it appeared upon the trial that, although at the time of such sale J. had been judicially declared a lunatic, that fact was not known to defendants, and that the sale was made in the ordinary course of business and with no attempt at deception, and for that reason defendants claimed that the complaint should have been dismissed upon the ground that the gravamen of the action was fraud.

*Geo. W. Dillaway*, for applts.

*Francis C. Reed*, for respt.

*Held*, That while the complaint alleged that the act of defendants was wrongful and unlawful, it did not allege such act was done with intent to cheat or deceive the purchaser, and that fraud was not therefore the gravamen of the action, and that inasmuch as dealings of this character with a lunatic are in equity regarded as wrong and unlawful to such an extent as to justify their rescission and the restoration of the parties to their

previous condition, the said allegations did not make the action one at law for fraud and deceit instead of one in equity to rescind the sale, and defendants were not entitled therefore to a dismissal of the complaint. That a sale to a lunatic will be set aside by a court of equity when the fact of lunacy existing at the time of the sale is established, whether defendants had or had not knowledge of its existence, 51 N. Y., 378; 8 Hun, 327; 84 N. Y., 330; 79 N. Y., 541, except that where the sale is for the benefit of the lunatic or his estate, and is made in good faith without knowledge of his condition, and the party who has made it cannot be put in *statu quo*, as he could in this case, the sale will be upheld.

The complaint charged a joint liability against defendants for the return of the purchase-money, but upon the trial it appeared that, although the sale was a single transaction made for the joint benefit of the defendants, three-quarters of the stock sold was owned by the defendant S., and one-quarter by the defendant D., and that the purchase-money was divided between them in the same proportion. By the judgment which was entered S. was ordered to return three-quarters of the purchase-money and D. one-quarter. It was insisted, however, by defendants that separate causes of action were shown against them, and that the complaint should have been dismissed as no joint judgment could have been rendered against them.

*Held*, That this view was erroneous, as the sale was a single one made by the defendant D., acting for himself and the defendant S., and there was nothing to show any separate individual transaction between either of those parties and the lunatic. That the court had the power to render the judgment which it did, 37 N. Y., 499, but that if defendants insisted that the judgment should be joint and not several as rendered and consented to a modification to that effect might be made, in which case the judgment should be modified to that extent, otherwise it should be affirmed.

Ordered accordingly.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

#### POLICE.

##### N. Y. COURT OF APPEALS.

The People *ex rel.* McCarthy. *respt.*, v. The Board of Police Com'rs of N. Y. City, *applt.*

Decided March 3, 1885.

The fact that the Commissioner before whom the evidence was taken was no longer a member of the Board when action was taken thereupon and the accused officer dismissed does not render such dismissal illegal. It is sufficient that the evidence was legally taken and was examined by all the members of the Board.

It is sufficient to conclude the appellate courts that the Commissioners had some evidence upon which they could base their decision.

On March 25, 1879, a charge was preferred against the relator, who was a patrolman in the police department of the city of New York, to the Board of Police Commis-

sioners, for neglect of duty in being off his post on the preceding night. He was notified of the charge and regularly brought to trial thereon, the evidence being taken before McL., one of the Commissioners, who subsequently went out of office, and the evidence was then submitted to the four Commissioners then in office, and they, after examining the evidence, found the relator guilty and dismissed him from the force, all the commissioners but one voting in favor of the finding. One of the rules of the police department provides that the evidence in such cases can be taken before one police commissioner and then laid before and examined by the commissioners before judgment. The relator claimed that he was illegally dismissed, because the commissioner who took the evidence was not a member of the Board when it was acted upon and the order of dismissal made.

*D. J. Dean*, for *applt.*

*W. J. Curtis*, for *respt.*

*Held*, Untenable; that it was sufficient that the evidence at the time it was taken was legally taken, and that it was submitted to and examined by all the members of the Board. 93 N. Y., 98; 23 Hun, 351.

It appeared that the only witness against the relator was a girl fourteen years old, whose evidence standing alone, if credited, proved the charge. Her evidence was fully and explicitly denied by the relator under oath. The decision in this case was rendered prior to September, 1880.

*Held*, That it was sufficient to

conclude the General Term and for this Court, that the commissioners had some evidence upon which they could base their decision.

Order of General Term, reversing and vacating the dismissal of defendant, reversed, and proceedings and order of defendant affirmed.

Opinion by *Earl, J.* All concur.

# COMMON CARRIERS. NEGLIGENCE.

N. Y. COMMON PLEAS. GENERAL TERM.

Charles F. Ulrich, *applt.*, v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided March 13, 1885.

Plaintiff was injured by an accident while riding on one of defendant's trains on a free pass containing a stipulation exempting defendant from liability for such occurrences. He had also purchased a ticket on the drawing-room car on said train, paying therefor the sum of one dollar. *Held*, That it not appearing what were the relations between the company alleged to have operated such drawing-room car and the railroad company, the car must be presumed to have been run for defendant's benefit, and the acceptance of plaintiff as a passenger thereon for hire avoided the stipulation in the pass exempting defendant from liability.

Appeal from judgment in favor of defendant, and from order denying motion for new trial. The action was for damages alleged to have been caused by defendant's negligence. Defendant contended that, inasmuch as plaintiff was riding on a free pass, he cannot recover even if his injuries were caused by the negligence of its servants.

The pass that plaintiff was using at the time of the accident

provides that "the person accepting this free ticket thereby, and in consideration thereof, assumes all risk of accident, and expressly agrees that the company are not common carriers in respect to him, and shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to his property while using this ticket."

The pass entitled him to ride in one of the common cars of the company, but plaintiff wished accommodations of a better kind, and he applied for transportation in one of the drawing-room cars that form a part of defendants' trains. He was accepted as a passenger in the drawing-room car called the Empire, and paid one dollar for transportation in that car to New York.

*G. G. Munger*, for *applt.*

*F. Loomis*, for *respt.*

*Held*, That if plaintiff had been traveling on the free pass alone, the stipulations that it contains would have been a bar to his recovery. A free passage is itself a full consideration for a contract that will discharge a carrier of passengers from its common law liability.

If the free pass gave him the right to travel on the train it gave him no right to travel in that car, and it is evident that the rights and relations of the parties were changed by the sale to him of the ticket for the drawing-room car. He became a passenger for hire. As a passenger for hire, who, in bargaining for transportation in

the drawing-room car, had made no contract that relieved the company from its liability for damages if he were injured through its negligence, plaintiff has all the rights that the law gives to ordinary passengers; and having paid for a ticket, he is not to be considered as any one who, in consideration of a free passage, has agreed not to hold the company liable for injuries. Defendant voluntarily made a new contract, and cannot now ignore it and insist that the rights of the parties shall be measured by a contract that was intended to operate upon a condition of affairs that it has seen fit to change.

We have heard the objection that defendant did not, but that the Wagner Car Company did, make the contract to carry the plaintiff in the drawing-room car. We know nothing of the arrangement between defendant and the Wagner Car Company, but as no one without leave of defendant can run cars upon its track, we must assume that the drawing-room cars are run for the benefit of defendant. 76 N. Y., 409.

Judgment reversed, and new trial ordered, with costs to abide the event.

Opinion by *Van Hoesen, J.*; *Daly, C.J.*, and *Larremore, J.*, concur.

#### COSTS AND ALLOWANCES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Anne Smith, *respt.*, v. Philip Smith, *applt.*

Decided March 4, 1885.

Plaintiff commenced an action against her husband for separation on the ground of cruelty. Before issue was joined an agreement was entered into between them whereby plaintiff returned to her marital relations with defendant, and defendant agreed to pay costs and counsel fee in the action. Subsequently, defendant served an answer. The action was never formally discontinued. *Held*, That the court had jurisdiction to enter an order in the action compelling defendant to pay plaintiff's costs and counsel fee.

Appeal from an order of Special Term directing the payment by defendant of plaintiff's costs and counsel fees.

This action was brought by plaintiff, who was the wife of defendant, for a separation upon the ground of cruelty. After the commencement of the action an agreement was made between the parties by which plaintiff was to return to the bed and board of defendant, and defendant was to pay the costs and expenses of the suit to her attorney. Several days after this arrangement and the return of the wife to her husband, he served an answer in the action. The suit was never formally discontinued. Defendant failed to pay the costs and counsel fee of plaintiff's attorney, and a motion was thereupon made upon which the order appealed from was entered.

*William H. Newman*, for applt.

*Wm. M. Roberts* and *Scott Lord*, for respt.

*Held*, That, while the action could not be further successfully prosecuted because of the agreement of settlement between the parties, the authority of the court

over it touching the question of costs still continued so far as to enable it to compel defendant to carry out that part of the agreement which related to the costs for the purpose of protecting plaintiff and her attorney. That plaintiff should not be turned over to a suit on the agreement because defendant by answering in the action subsequent to the agreement had elected to keep it in life, and defendant could not, after so doing, get it out of court without doing what was just and right touching plaintiff's costs and expenses. 40 How. Pr. 465; 47 N. Y., 144.

*Chase v. Chase*, 29 Hun, 527, distinguished.

That the order should, however, have directed the discontinuance of the action on payment of the costs.

Order modified as above suggested, and, as modified, affirmed.

Opinion by *Davis, P.J.*; *Brady*, and *Daniel's, JJ.*, concur.

## CONSTITUTIONAL LAW. FERRIES.

### N. Y. COURT OF APPEALS.

*In re* application of the Union Ferry Co. to acquire title to lands.

Decided Feb. 3, 1885.

Chap. 259, Laws of 1882, authorizing the lessees of certain ferries to acquire the right to use a specified pier and lands adjoining. is not a grant to a private corporation within § 18 of Art. 3 of the Constitution, nor does it grant any exclusive privilege, immunity, or franchise.

If the use to which the property is to be put is certainly a public one, the legislature

has power to determine the necessity of the exercise of the right of eminent domain and the extent to which it shall be carried, and its determination is not reviewable.

Reversing S. C., 19 W. Dig., 101.

The petitioner, under the provisions of Chap. 259, Laws of 1882, an act "to provide additional ferry slips and facilities in New York city," &c., presented a petition for the appointment of commissioners to appraise the compensation to be paid to the owners of Pier No. 2, East River. The Act of 1882 authorized the lessees of certain ferries therein specified to acquire by proceedings *in invitum* the right to use a pier and adjoining land under water. It was claimed that the act violated section 18 of article 3 of the State Constitution, which provides that the legislature shall not pass a private or local bill "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever."

*John Develin*, for applt.

*Geo. G. DeWitt, Jr., Elbridge T. Gerry, Abraham Van Santvoord* and *John H. Martin*, for respts.

*Held*, Untenable; that the act of 1882 is not a grant to a private corporation. The authority conferred by it is merely an appointment of an agency to exercise the right of eminent domain for the benefit of the public. It does not grant any exclusive privilege, immunity or franchise. The grant of a particular power to a private corporation is not exclusive simply because the same power is not possessed by other corporations, so long as there is nothing to prevent the granting



of such power to any other corporation. An act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise.

It was also urged as a further objection to the constitutionality of the act of 1882 that it does not require the ferry company to establish the fact that the property supposed to be taken is necessary for the purposes of the ferry.

*Held, Untenable.* If the use is certainly a public one the legislature is the proper body to determine the necessity of the exercise of the right of eminent domain and the extent to which it shall be carried. *Mills on Eminent Domain*, ch. 2, § 11; 45 N. Y., 234; 23 Wall., 108. The particular property needed may be pointed out by the legislature, and the courts cannot review its determination in this respect. *Mills on Em. Dom.*, § 11; 4 Ohio St., 308. This does not render the grant exclusive under the constitution. The exclusiveness contemplated by it being one which is created by the terms of the grant, and not that which results from the nature of the property or right granted.

The act of 1882 is further assailed on the ground that it declares (§ 1) that the pier in question shall, after June 15, 1882, be devoted and set apart for the purpose of additional ferry accommodations for the ferry in question. This, it was claimed, authorized the taking of property without compensation. The act also provided (§ 2) that before using the pier the lessees must

acquire title and compensate the owners.

*Held, Untenable;* that the wharves and piers of the city of New York are in many respects public, and even when owned by individuals are subject to regulations as to their use by legislative enactments. 7 Cow., 349.

The act of 1882 provides that the power of eminent domain shall be exercised "in the manner and by the proceedings provided by law for acquiring title to lands for railroad use by railroad corporations, so far as the same are applicable thereto," except that certain allegations as to stock subscriptions, maps, surveys, may be omitted. It was claimed that this reference was too indefinite.

*Held, Untenable;* that it must be deemed to refer to the general railroad act. 67 N. Y., 575.

Order of General Term, affirming order of Special Term, reversed, and proceedings remitted to Special Term to appoint commissioners.

Opinion by *Rapallo, J.* All concur.

#### RAILROADS. DAMAGES.

##### N. Y. COURT OF APPEALS.

*In re* application of the C. & H. Horse R.R. Co. for appointment of commissioners.

Decided March 3, 1885.

Certain railroads having refused to allow petitioner to cross their tracks, commissioners were appointed who decided in favor of the petitioner and awarded \$1 damages. No evidence was offered as to any pecuniary injury or as to the pecuniary value of the right to cross. *Held.* That it could not, under the circumstances, be said as matter of law that the

damages awarded were inadequate, and that the order imposing the costs of litigation on the opposing roads was discretionary and could not be reviewed.

The petitioner, the C. & H. H. RR. Co. in May, 1883, presented a petition to the Supreme Court for the appointment of commissioners to determine the points and manner of crossing the tracks of the S. B. & N. Y. RR. Co. and the D., L. & W. RR. Co. It appeared that the two last mentioned companies declined to permit the petitioner to cross their tracks, and when commissioners were appointed the question litigated before them related to the place and manner of crossing, and not at all to the question of compensation, as to which no evidence was given. There was under the circumstances no practical difficulty in giving evidence merely upon the amount of compensation. The commissioners granted the prayer of the petitioner and awarded one dollar as damages to the other companies. Subsequently the petitioner moved for an order requiring the other companies to pay the costs of the proceeding. This motion was granted.

*Lewis Marshall*, for applts.

*R. H. Duell*, for respt.

*Held*, No error; that as no constitutional right is involved in the order of the Special Term imposing costs of the litigation upon the appellants its discretion in making it cannot be reviewed.

*Also held*, that as there was no evidence as to any pecuniary injury or as to the pecuniary value of the right acquired by the respondent,

or of the loss which would be sustained by the appellants it cannot be said as matter of law that the amount of damage awarded was inadequate. 94 N. Y., 489.

Order of General Term, affirming order of Special Term, affirmed.

*Per Curiam* opinion.

All concur, except *Miller* and *Rapallo JJ.*, and *Ruger, Ch. J.*, not sitting.

## UNDERTAKING. PLEADING.

### N. Y. COURT OF APPEALS.

*Hemmingway*, adm'r, *respt.*, v. *Poucher*, impl'd, *applt.*

Decided March 3, 1885.

The validity of an undertaking, given under § 348 of the Code of Pro., depends upon its efficiency in securing to appellant the stay it was intended to enable him to obtain. The obligee cannot enforce such undertaking after repudiating it as a stay.

A party is not required to state in his answer the theory of law upon which his defense is based, but only to state the facts, and if they are so stated as to enable the court to see that they constitute a defense the pleading is not demurrable because their legal effect is not stated, or even because the proper form of relief is not demanded.

Reversing S. C., 18 W. Dig., 871.

This was an action on an undertaking given on appeal to the General Term from a judgment recovered July 5, 1872, by the plaintiffs, at circuit against one L. The section of the Code in pursuance of which the undertaking was given (§ 348) provides: "Such an appeal, however, does not stay proceedings unless security be given, as upon an appeal to the Court of Appeals." The appeal from the original judgment and all proceedings thereon

slept until some time in 1882, when the plaintiff herein, as the successor of the plaintiffs in the original action, noticed a motion to compel the appellant therein to execute a new undertaking on such appeal, or in default thereof that he have leave to issue execution on such judgment. This motion was granted in June, 1882, and an order made requiring said appellant to file within twenty days a new undertaking, and in default thereof plaintiff had leave to issue execution upon and collect such judgment. The undertaking required was not given, and on July 9, 1882, execution was issued and a levy made upon real estate of the appellant worth more than enough to pay the judgment, and the Sheriff proceeded to advertise the same for sale. Subsequently argument was had upon the appeal, and a judgment of affirmance rendered December 19, 1882. The trial court gave plaintiff judgment for the amount of the undertaking, which judgment was affirmed by the General Term.

*Wm. Tiffany*, for applt.

*M. Fillmore Brown*, for respt.

*Held*, Error; that the spirit and object of § 348 of the Code, as well as its language, requires it to be so construed as to make the validity of an undertaking given thereunder depend upon its efficacy in securing to the appellant the stay it was intended to enable him to obtain. The obligee could not enforce such an undertaking after repudiating it as a stay. 90 N. Y., 480; 31 Hun, 187.

Upon a trial before a court or

referee an exception to a general finding of law holding that one party is entitled to recover against the other raises a question similar to that arising upon a special verdict, as to whether, upon all the facts found, the successful party is entitled to recover or not. 3 How. Pr., 369; 9 N. Y., 463.

A party is not obliged to state in his answer the theory of law upon which his defense is based. He was only required to state facts therein, and if they are so stated as to enable the court to see that they constituted a defense to the action the pleading is not demurrable because he did not state the legal effect of the facts, or even because the proper form of relief was not demanded. 21 N. Y., 490.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial ordered.

Opinion by *Ruger, Ch. J.* All concur.

#### COMMON CARRIERS. LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Geneva, I. & S. RR. Co., *applt.*, v. William H. Sage, *respt.*

Decided Jan., 1885.

Where a common carrier delivered goods to a consignee without payment of freight, and thereafter a dispute arose as to the amount to be paid, *Held*, in an action of replevin, that the question whether plaintiff had waived its lien was properly submitted to the jury.

An erroneous admission of incompetent evidence is cured by a direction to the jury to strike it entirely out of their consideration.

Appeal from judgment entered on verdict; from order denying

motion for a new trial on the minutes, and from order refusing a new trial on motion as to newly discovered evidence.

Action to replevin a horse.

On Feb. 17, 1883, a horse consigned to defendant arrived at plaintiff's freight depot in Ithaca, and a telephone message was sent to defendant at 11 P. M., notifying him of its arrival. Defendant inquired if the horse could be kept until morning, and was told he could; he then gave directions as to watering and feeding, and said to plaintiff's agent that he would send and get the horse in the morning, and was told "All right." He sent his man in the morning and got the horse. Subsequently a dispute arose between defendant and plaintiff's agent as to the amount of freight to be paid, which was kept up until this suit was brought, two and a half months after the horse arrived.

*F. E. Tibbetts*, for applt.

*White & Nichols*, for respt.

*Held*, That the evidence warranted the court in submitting the case to the jury to find whether plaintiff had, under the circumstances disclosed in the evidence, waived its lien upon the horse and consented to rely upon defendant's personal liability and ability to pay the freight bill. If plaintiff did consent to waive such lien, then this action ought not to be maintained. The surrender of possession of property is a fact of much importance upon the question of waiver of the lien. 4 Den., 496.

We see no evidence of trick, fraud, or overreaching on the part

of defendant to obtain possession. It is not suggested that he is not entirely responsible for the freight. We think the jury had evidence upon which they might properly find, as they did, that the lien of the carrier had been waived, and plaintiff and its agents had consented to rely upon defendant's personal responsibility. We do not feel at liberty to disturb the verdict in that regard. 6 Hill, 43; 47 N. Y., 622.

Evidence was received, under objection, as to an altercation between defendant and plaintiff's agent in regard to a former freight bill. The court in charging the jury said: "You have nothing to do with the difficulty in regard to the freight at all; you put that entirely aside; strike it out of consideration entirely."

*Held*, That the error in receiving the evidence was cured by this instruction. 67 Barb., 549; 63 N. Y., 143; 16 W. Dig., 63; 85 N. Y., 90; 23 Hun, 454.

*Also held*, That the affidavits were insufficient to present a case for a new trial upon the ground of newly discovered evidence. The diligence to be used prior to the trial was not shown. Besides, the evidence proposed, so far as material, was cumulative. 6 T. & C., 637; 19 W. Dig., 373. It is not made clear that the newly discovered evidence, if produced, would change the result. 2 Hun, 599; 42 Barb., 24.

Judgment and orders affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

## EXECUTORS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Joshua M. Van Cott, *respt.*, v. John Prentice et al., *ex'rs.*, *appls.*

Decided Feb., 1885.

Defendants were sued as executors of John H. Prentice, deceased. The sole question presented is whether the title to certain securities is in plaintiff or in defendants as such executors. An amendment was made after trial by which defendants were made to answer individually to plaintiff's claim. *Held*, That while it may be within the power of the court to amend the complaint after a trial, an amendment the effect of which is to charge the executors personally in respect to a dispute which is carried on by them solely for the benefit of the estate which they represent cannot be sustained.

Appeal from order and judgment in favor of plaintiff. The action was brought by plaintiff against defendants as executors to determine whether the title to certain securities was in plaintiff or in defendants as executors. After trial an order was made striking out the word "as" from the title, and judgment entered against defendants individually upon the verdict.

*Tracy, Catlin & Hudson*, for *appls.*

*Alexander H. Van Cott*, for *respt.*

*Held*, That the amendment made after trial by which defendants were made to answer individually to plaintiff's claim cannot be sustained. While it may be within the power of the court to amend the complaint after trial, such amendment should not be made when the effect is to charge defendants personally in respect to a

dispute which is carried on by them solely for the benefit of the estate which they represent. The cases cited to justify the amendment have no relevancy. *Ferrin v. Myrick*, 41 N. Y., 315, and *Patterson v. Patterson*, 59 N. Y., 574, refer to contracts made by executors after the testator's death. The theory of those cases is that the executors' contract must be performed by them personally because they cannot bind their estate. In this case the executors are bound to assert their claim to the property as part of their intestate's assets. The question is novel and doubtful, and it would be injustice to impose upon the executors the duty of personally becoming responsible for the cost of the litigation. They have not converted the property to their own use. The complaint avers that defendants held the securities in question "in their representative capacity," and in no other way. The answer admits this, and avers title in the estate which they represent.

Order amending complaint reversed. Judgment otherwise affirmed.

Opinion by *Barnard, P.J.*; *Pratt, J.*, concurs.

## NEGLIGENCE. PRACTICE.

N. Y. COURT OF APPEALS.

*Fitzpatrick*, adm'r, *applt.*, v. The N. Y., N. H. & H. RR. Co., *respt.*

Decided March 3, 1885.

In an action to recover for death alleged to have been caused by negligence, where the evidence of defendant's negligence and of plaintiff's freedom from contribu-

tory negligence are weak and inconclusive, and the facts imperfectly disclosed, but inferences are possible from them in favor of plaintiff, a non-suit is improper.

This action was brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by the negligence of the defendant. The defendant denied negligence on its part, and alleged negligence on the part of F. The evidence of negligence on the part of the defendant and of freedom from contributory negligence on the part of F. was weak and inconclusive, and the facts were very imperfectly disclosed, but such inferences were possible from them as made it the duty of the court to submit the case to the jury. At the close of the plaintiff's evidence a motion for a non-suit was made and granted.

*Julius Lipman*, for applt.

*H. H. Anderson*, for respt.

*Held*, That the court erred in granting the motion for the non-suit.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

*Per curiam* opinion. All concur, except *Rapallo, J.*, not voting.

## EVIDENCE. DAMAGES.

### N. Y. COURT OF APPEALS.

Moyer, admr., *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided March 3, 1885.

Although a question be otherwise proper, yet when it is asked on a redirect examination after the court has ruled out similar questions on the ground that plaintiff

is seeking to reopen his case, and when the question has already been fully and fairly answered, it is not error to rule it out.

In an action for damages to lands, a witness was asked their fair market value before the injury. *Held*, Admissible; that this did not exclude evidence of a subsequent natural depreciation or the reverse not occasioned by the injury.

This action was brought to recover damages for injuries to the lands of M., plaintiff's intestate, alleged to have been caused by the acts of defendant in obstructing the natural flow of a river. The jury found for the plaintiff. One of defendant's witnesses, who appeared to be an engineer of skill and experience and had studied the river and tested its flow at the points of the alleged destruction and injury, was cross-examined at some length. He was asked, upon the hypothesis that before the building of the alleged obstructions M.'s lands had not been scoured or injured, and immediately after such construction the injury had begun and steadily continued, if he would assign the obstruction as the cause. He answered in substance that he would not if there was any other known cause, and if there was not he would assign the injury to some other cause of which he was ignorant; but if there was no other possible cause known or unknown except the obstruction he would charge the injury upon that. Upon being re-examined he was asked, among other things relating to the scouring of the water upon plaintiff's land, "Are there any adequate causes, in your judgment, for this?" This question was ob-

jected to as calling for a speculative opinion. The objection was sustained, and defendant excepted.

The court had already ruled out similar questions on the ground that defendant was thus seeking to reopen his case. The witness had said that if the lands were not washed materially prior to 1873, and were scoured immediately after the construction of the embankments, it may have been the result of the damming up of the ice and its currents. He was then asked, "Is there any other cause which you know of?" and answered, "there is this narrowing of the section by the obstruction." He had already said that the scouring was due principally to the waters of a creek rather than to those of the river, and was occasioned not by depth of water on the lands, but by water in motion or currents having appreciable velocity.

*S. W. Jackson*, for applt.

*D. S. Morrell*, for respt.

*Held*, That although the inquiry was not speculative in an objectionable sense, the witness was an expert and was speaking on a question of science, and might well be asked in presence of a given effect of what causes it was or might be the resultant, but as the question was asked on a re-direct examination after the court had twice ruled out similar questions on the ground that plaintiff was seeking to reopen his case, and as the question asked had been fully and fairly answered, there was no error in refusing a needless repetition.

A witness was asked the fair

market value of the lands before the building of the obstructions by the defendant. This was objected to on the ground that the true measure of damages should have been the difference in value between the lands as injured or uninjured at the commencement of the suit.

*Held*, That the question sought only one of the facts necessary to a proper commutation, and did not at all exclude evidence of a natural depreciation or the reverse after 1873 not occasioned by the injury.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

#### WATER COURSE. SURFACE WATER.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Lydia A. Venum, applt., v. Andrew A. Wheeler, respt.*

Decided Jan., 1885.

A person has no right by ditches and artificial channels to take water from its natural course and accustomed channels and throw it upon the lands of another; and the rule is the same even if the water so diverted is all surface water.

A person is liable for damage to the adjoining owner if he so diverts water and discharges it first upon his own premises where it sinks into the soil and by percolation through the soil reaches the premises of the adjoining owner.

Appeal from judgment entered upon verdict for defendant, and from order denying motion by plaintiff for judgment in her favor and directing judgment for defendant; and from order denying motion for a new trial.

Action to recover damages for the wrongful diversion and discharge of water by defendant upon plaintiff's land. A verdict was ordered for defendant. The evidence tended to show the following facts:

Defendant is owner of a farm north of and higher than plaintiff's farm. There was a low and swampy part of defendant's land, sometimes a pond, into which two streams ran and where surface water also collected. This swamp naturally discharged its surplus waters to the west and not upon plaintiff's land. It was separated from plaintiff's land by high ground which is impenetrable to water. Through this high ground defendant dug a deep and wide ditch to a point on his own land, some 24 rods south of the deepest part of the pond or marsh. Through this ditch defendant discharged the whole of the waters of said pond and marsh upon his own land, where the same was so gravelly as immediately to take up such waters and transmit them under ground down upon plaintiff's land some 30 rods below, where it again came to the surface and caused plaintiff damage. The jury found that an increased quantity of water was thrown upon plaintiff's premises by reason of the ditch made by defendant and that plaintiff's premises had been damaged thereby in the sum of \$375, but it was not allowed to pass upon the main question, whether defendant had unlawfully diverted waters from their ordinary and natural course or had discharged such waters in an un-

usual manner and with unaccustomed force and quantity upon plaintiff's land.

*Jno. C. McCartin*, for applt.

*O'Brien, Emerson & Ward*, for respt.

*Held*, That the case was erroneously taken from the jury and decided as a question of law. If there were streams running into this pond on defendant's land he had no right to change their course and pour their waters upon plaintiff's premises.

The character of the streams was a matter of proof on the trial. It was fairly before the court and jury and the court erred when it refused to submit to the jury whether plaintiff was not entitled to recover on the facts proved, and instead thereof directed a verdict for defendant.

But assuming that the water in question was *all surface water*, defendant would have no right by ditches and artificial channels to take it from its natural course and accustomed channels and throw it upon plaintiff's premises to her injury. There is no conflict of authorities upon this point. *Wash. on Eas.*, 2d ed., 432, 427—31, 439; 26 *Penn St.* 407, 413; 47 *Id.*, 155; 4 *Lans.*, 47; 79 *N. Y.*, 470. The case relied upon by the learned justice at circuit, 86 *N. Y.*, 140, announces the same rule. At p. 147 the learned judge says the owner of land is the absolute owner of surface water thereon, and he may "get rid of it in any way he can, provided only that he does not cast it by drains or ditches upon the land of his neighbor," and again,



"The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law." 16 Moaks Eng. Rep., 299, note. Defendant may insist that he dug this ditch and discharged this water upon his own premises, 20 rods or more from plaintiff's land, where it sank into the soil and by percolation through the soil reached plaintiff's premises. Conceding that to be true it does not relieve defendant. The injury is the direct consequence of the water from defendant's ditch. Though discharged at first upon his own land it ran of necessity immediately upon plaintiff's land, and it is immaterial whether on or above or below the surface.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

Opinion by *Boardman, J.*; *Hardin, P.J.*, and *Follett, J.*, concur.

#### VILLAGES. HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Elkanah Washburn, respt., v. The Village of Mt. Kisco, applt.*

Decided Feb., 1885.

Defendant is a village corporation carved out of the territory of New Castle, and incorporated under Chap. 291, Laws of 1870. Plaintiff's horse was killed by reason of a defect in a bridge which was within the limits of the village. *Held*, That the town and not the village is liable.

The facts sufficiently appear from the opinion.

*Held*, That the primary duty of keeping bridges in repair is imposed upon the town. It is the duty of the Town Commissioners of highways to keep the bridges safe and in good repair. 1 R.S. 460. Defendant is a village corporation carved out of the territory of New Castle and incorporated under Chap. 291, Laws of 1870. Plaintiff's horse was killed by reason of a defect in a bridge which was within the limits of the village, and the question is whether the village or town is liable for the injury.

\* \* \* It is necessary to examine the village charter act and determine whether or not the duty of keeping up safe the bridges is taken from the town and imposed upon the village, under circumstances like those in respect to defendant. The act permits the incorporation "of any part of any town" with certain population. Title 1, § 1. The trustees have power "to make and repair all bridges which may be necessary within the bounds of the village" Title 3, § 1, sub. 25. The village thus incorporated is a separate highway district exempt from the superintendence of any one except the Board of Trustees, who shall be commissioners of highways in and for such village and shall have all the powers of commissioners of highways of towns in this State subject to this act." By title 8, § 27, it is shown what the duty in respect to bridges really is intended to be and what the power over roads and bridges in villages is subject to. § 27:

"Nothing in this act giving the board of trustees of a village power to make and repair bridges within the village bounds, or making them commissioners of highways, or making the territory of the village a separate highway district subject to the board of trustees alone, shall be construed as divesting the commissioners for any town in which a bridge may be located of power or control over the same or as relieving such town from the expense of constructing or repairing any bridges within its bounds, though such bridge may be within the territorial limits of a village incorporated under this act. In case the board of trustees of any village so incorporated shall think proper to construct or repair any bridge within the corporate limits, then the expense of such work shall be a charge on the taxable property of the village and be paid out of the corporate funds." The village is not bound to repair bridges. The stipulation shows that it did not do so before the accident. The town duty continued in full force. The breach of duty must be enforced against the town and not the village. The village could repair at its own expense, but it was not bound to do so, and thus no duty absolute and imperative is cast upon the village. It had at best a right to spend its own money in repairing a bridge, which it never exercised. The town commissioners were still bound to keep safe the bridge if the village did not elect to do so, and the town commissioners were bound to see to it

that the bridge should never become unfit for travel by the public.

Judgment reversed, and judgment rendered that the village was not liable to plaintiff.

Opinion by *Banard, P.J.*; *Pratt, J.*, concurs; *Dykman, J.*, not sitting.

#### DIVORCE. ABATEMENT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Ella J. Hopkins v. Alexander Hopkins.*

Decided Feb., 1885.

It is improper after the death of a plaintiff in an action for divorce for the attorney to take further steps in the action in the name of the deceased plaintiff. The action dies at the death of such party.

This was an action for a divorce. An order was made that defendant pay to plaintiff or her attorney fifty dollars for counsel fee therein. Defendant was committed to jail by reason of failure to make payment according to the terms of the order, and remained there some five months. Then an order was made, Dec. 10, 1883, discharging him from further imprisonment. On the 19th of May, 1884, another order was made, vacating the order of Dec. 10, 1883, and again committing defendant to jail. When the order of May 19, 1884, was made plaintiff was dead. An order was made Oct. 15, 1884, discharging defendant from his imprisonment, and this is an appeal therefrom.

*Albert Day*, for applt.

*Max Hallheimer*, for resp't.

*Held*, That the action died with

the plaintiff. She was a sole plaintiff, and the cause of action did not survive. It was improper after her death for the attorney to take further steps in the action in the name of the deceased plaintiff. At the time of plaintiff's death the attorney had no right to enforce the payment of the fifty dollars by any order of the court, and he could not get such a right after her death. The case is not like *Lachenmyer v. Lachenmyer*, 17 W. Dig., 310; 65 How., 422. The attorney in that case had a bill of costs and expenses incurred in defending a motion to vacate an order of arrest. He had the remittitur of the Court of Appeals, and the party, his client, died soon afterwards. Then he had leave to issue execution for the costs in his own name against defendant's property. In this case, as has been observed, he had no right whatever.

Order affirmed.

Opinion by *Barnard, P.J.*; *Pratt* and *Dykman, J.J.*, concur.

#### LOAN.

##### N. Y. COURT OF APPEALS.

*Poucher, admr., applt., v. Scott, exr., respt.*

Decided March 3, 1885.

In an action to recover an alleged loan it was shown that plaintiff's intestate received certain checks, and that on the following day they were in the possession of and used by defendant's testator, with whom intestate resided. *Held*, That no loan was proved; that if there was a direct transfer it must be deemed a voluntary delivery in payment of an existing liability rather than a loan.

This action was brought to recover an alleged loan of \$2,000

from C., plaintiff's intestate, to S., defendant's testator. It appeared that on June 5, 1874, C. received from a savings bank two checks of \$1,000 each, payable to cash or bearer. The next day S. had said checks and used them with other money in his business. C. was not at that time engaged in business, but resided with S., in whose house he died March 1, 1875. The checks in question were paid by the banks upon which they were drawn in the usual course of business. The answer of S., sworn to in his lifetime, denied wholly the alleged loan or advance, and set up counterclaims for which judgment was asked. One of these was for medical services stated in a bill of particulars furnished and running back twenty years. Another was for board and lodging from December, 1874, to March, 1875. A third was for the payment of a note to one A., one-half of which was the debt of C., and a fourth was a receipt by C. of moneys belonging to S. upon a land contract.

*William Tiffany*, for applt.

*D. P. Morehouse*, for respt.

*Held*, That plaintiff was not entitled to recover; that no loan was proved, there being a clear failure of proof.

A fraud or felony cannot be presumed; if the transfer was direct it must be deemed a voluntary delivery in payment or discharge of an existing liability rather than a loan. 78 N. Y., 290.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Finch, J.* All concur.

## ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Marine National Bank, *respt.*,  
v. Ferdinand Ward et al.

Decided March 4, 1885.

A person who has acquired a lien upon or interest in property after it has been attached may found a motion to vacate the attachment upon the insufficiency of the papers upon which the warrant was granted.

An affidavit made for the purpose of obtaining an attachment in an action in which a national bank is the plaintiff is not sufficient for that purpose when it is made by a person who is stated to be the vice-president and a director of plaintiff, but who is not shown to have had any special knowledge of or connection with the business affairs of the bank beyond what is implied by said statement, and the allegation in regard to counterclaims is that "the plaintiff is, as deponent is informed and verily believes, entitled to recover of the defendants the sum of \$700,000 over and above all counterclaims known to the plaintiff or to deponent."

In order to warrant the granting of an attachment upon the ground that the defendant has made a fraudulent conveyance of a portion of his property, such fraudulent conveyance must be shown by something more than allegations merely upon information and belief.

Appeal from an order of Special Term, denying motion to vacate attachment.

The motion to vacate the attachment in this case was made by one H., as the general assignee of the defendant Ward for the benefit of creditors, claiming that as such assignee he had an interest in the property attached, which interest was acquired subsequent to the attachment. The motion was made upon the ground that the affidavits upon which the warrant was

granted were fatally defective in two particulars, one of which was that they failed to show that the plaintiff was entitled to recover the sum stated therein over and above all counterclaims known to plaintiff. The principal affidavit upon which the attachment was granted was made by one S., who was stated to be the vice-president and a director of the plaintiff, but who was not shown to have had any special knowledge of or connection with the business affairs of the bank beyond what was implied by said statement. The statement upon which the objection arose was in these words: "And deponent further says that the plaintiff is, as deponent is informed and verily believes, entitled to recover of the defendant the sum of \$700,000 over and above all counterclaims known to plaintiff or to deponent."

*T. H. Hubbard*, for applt.

*F. N. Bangs*, for respt.

*Held*, That there was no statement, based upon the knowledge of any affiant, that the plaintiff was entitled to recover the sum named over and above all counterclaims known to it. The affiant merely stated that he was informed and verily believed that such was the case, and did not give the source of his information nor the grounds of his belief, nor state any facts from which the judge granting the attachment could see that his belief was well founded.

That while the affidavit in this respect might undoubtedly be made by an agent of the plaintiff or an officer of a corporation to whom

facts are personally known, or where his information is based upon such facts disclosed by the affidavit as show satisfactorily that the plaintiff is entitled to recover the sum stated over and above all counter-claims known to the plaintiff and the affiant, it is not enough for such agent or officer to make his statement simply upon information and belief, without showing whence and from whom his information is derived, and why the affidavits of the informants are not produced, and that therefore it was impossible to uphold the affidavit in this case as a compliance with the requirements of the Code. 30 Hun, 248; 19 id., 299; 9 Daly, 413; 85 N. Y., 500; 87 id., 141; 30 Hun, 337; 27 id., 216; 12 id., Dig., 318; 54 N. Y., 561; 44 id., 274; 7 Hun, 352.

The second defect in the affidavits upon which the attachment was granted relied upon to defeat the attachment was that the alleged fraudulent disposition of property by Ward, which was the cause of the granting of the attachment, was not sufficiently shown by the affidavit, because the material allegations in that behalf were made chiefly upon the information and belief of the affiant. The debt, to recover which this action was brought, was incurred some months after the conveyance of property alleged to be fraudulent.

*Held*, That every material circumstance in the affidavit tending to show that the conveyance of the property was fraudulent and void

as against creditors was stated solely on information and belief.

That if it be conceded that an attachment could be obtained by a creditor upon an indebtedness arising several months after such a conveyance was made, on the ground that at the time the conveyance was made the defendant was largely indebted to other creditors so that the transfer might be regarded as fraudulent as against them, yet the facts to sustain such an allegation of fraud should be shown by something more than mere information and belief. That the affidavits of the other creditors, or at least their names and the amounts due to them, and the kind of information they have communicated, ought certainly to have been set forth.

That a person who has acquired a lien upon or interest in the property after it has been attached may found his motion to vacate the attachment upon the insufficiency of the papers upon which the warrant was granted. 75 N. Y., 179; 78 id., 252; 85 id., 243.

Order reversed and attachment vacated.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

*Murphy, adm'r, resp't., v. The City of Brooklyn, applt.*

Decided March 3, 1885.

Plaintiff's intestate was drowned in a hole near high-water mark on private grounds caused by the discharge of sewerage from a discharge shoot built by defendant.

It did not appear how the boy got into the hole, and there was no proof how long the hole had existed or that defendant's agents knew of it. *Held*, That defendant could not be charged with negligence under the circumstances.

Everyone may use the seashore, between high and low water mark, for any lawful purpose, but he must use it as he finds it, and cannot look to anyone for any damages he sustains from any defects therein.

This action was brought by plaintiff to recover damages for the death of his son, a boy about six years of age, on July 10, 1882, by drowning in a hole caused by sewerage matter being forced from a wooden box which had been built by defendant as a discharge shoot into Gowanus Bay for one of its large trunk sewers. There was no evidence as to how the boy got into the hole, which was above but near high-water mark on private property, with the owner's consent, at least fifty feet from the public street. There was no proof as to how long the hole had existed, or that the authorized agents of the defendant knew of its existence.

*John A. Taylor*, for applt.

*Jesse Johnson*, for respt.

*Held*, That plaintiff was not entitled to recover; that the defendant could not be charged with negligence under the circumstances in causing or permitting this hole; that defendant had no sufficient knowledge of the existence of the hole to render it liable.

The seashore between high and low water mark is not a highway for public travel on foot or with vehicles. Everyone can (except the public authorities, by lawful action, interfere) go there to fish, bathe or

for any other lawful purpose, but he must use the shore as he finds it, and can look to no one for any damages he sustains there from any defects therein.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Earl, J.*; *Rapallo* and *Andrews, JJ.*, concur. *Ruger, Ch. J.*, *Miller* and *Danforth, JJ.*, concur on the ground of want of notice. *Finch, J.*, dissents.

#### MALICIOUS PROSECUTION. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Chapman W. Avery, respt.*, v. *James H. Blair, applt.*

Decided Jan., 1885.

A complaint for malicious prosecution need not allege that the accusation was false or falsely made.

Evidence to show that defendant employed counsel to try the indictment against plaintiff is proper.

Where the plaintiff simply shows that defendant was a witness against him before the Grand Jury, evidence tending to show what he testified to before the Grand Jury is inadmissible.

Where the facts relied upon to make out a want of probable or reasonable cause are in dispute, it is the duty of the court to submit that question to the jury.

Appeal from judgment in favor of plaintiff, entered upon verdict, and from order denying motion for a new trial.

Action for malicious prosecution. Defendant claimed that plaintiff had committed forgery in the alteration of the date of a \$200 note endorsed to defendant by plaintiff.

The complaint alleged that defendant, "without any probable cause, and further contriving and maliciously intending to injure the plaintiff in his good name and reputation, \* \* appeared before the Grand Jury of the Oyer and Terminer, held in and for the county of Onondaga, \* \* and caused an indictment to be found against said plaintiff by said Grand Jury \* \* upon the charge of forgery hereinbefore stated in this complaint;" that defendant, by virtue of said indictment, wrongfully and unjustly caused a bench-warrant to be lodged with the Sheriff; that plaintiff was arrested thereon, and gave bail for his appearance at the next term of the Court of Sessions; that the trial was put off for two terms at the request of defendant; that at the April term, 1879, a trial was had which resulted in an acquittal of plaintiff, and he was duly discharged, "and said prosecution was then and there ended;" that in consequence of said prosecution plaintiff was subjected to great expense, to wit, \$200, and his name was brought into public scandal and disgrace, to his damage.

It was claimed that the complaint was defective in not stating that "the accusation was false or falsely made." The court held that the complaint contained a cause of action.

*Hunt, Leavenworth & Stern*, for applt.

*Fuller & Kellogg*, for respnt.

*Held*, No error. Under the Code Civ. Pro. all that is required to be alleged is a "plain and concise statement of the facts constituting

each cause of action without unnecessary repetition." Code, § 481. Plaintiff's action was for a tort, committed by defendant, in having instituted and carried on a malicious prosecution of plaintiff. In order to support such an action plaintiff must show, 1, malice; 2, want of probable cause on the part of defendant; 3, that the former proceedings were determined in his favor, and, 4, that he has suffered damage by reason of such prosecution. *Moaks Underhill on Torts*, 163, Rule 5; 48 Barb., 30; 2 Den., 617; 81 N. Y., 428. Malice may be implied from proof of want of reasonable and probable cause. 1 T. R., 544; *Moaks Underhill on Torts*, 163 n.

During the trial it appeared that prior to his appearance before the Grand Jury defendant had caused the arrest and arraignment of plaintiff before a Police Justice upon the same charge, and that after several adjournments that proceeding was dropped or discontinued.

*Held*, That it was not error to show the dropping of the matter in the police court. It bore upon the motive of defendant in the subsequent acts which were charged to be malicious.

*Forshay v. Ferguson*, 2 Den., 617, distinguished.

*Also held*, That it was proper to allow evidence that defendant lodged a complaint with the District Attorney before the indictment was found.

*Also held*, That evidence showing that defendant employed an attorney to try the indictment against

plaintiff and paid him therefor was entirely proper. 2 Greenl. Ev., § 450.

The arrest of plaintiff was not made until some five months after defendant was informed of the result of the trial in which the alteration of the note was involved. One C., who had been counsel for defendant on that trial and in the police court, was asked if he could explain why there was this delay on the part of defendant. He was allowed to answer, under objection, and said: "Yes; it was for the convenience of counsel; it was not Mr. Blair's fault."

*Held*, No error, and that there was nothing prejudicial to defendant in the answer.

The District Attorney, after testifying that his attention had been called to the matter by C. and that he had talked with defendant about it, stated that defendant "was a witness before the Grand Jury. I have no doubt he was there." On cross-examination defendant sought and offered to show by him what defendant testified to before the Grand Jury. This was objected to and excluded.

*Held*, No error. If allowed, it would enable defendant to use his statements in that proceeding or trial in supporting his defense here. It would enable him to show his declarations upon another issue in his own favor. In no way had plaintiff called out what was testified to by defendant. Simply the fact that he had testified before the Grand Jury did not authorize the details of that testimony to be given by way of cross-examination.

When the facts are not in dispute or contradiction it is the duty of the court to rule as a matter of law whether a case of want of probable or reasonable cause is made out. However, where the facts relied upon to make out that branch of a case are in dispute and the evidence is contradictory, it is the duty of the court to submit the questions of fact so arising to the jury. 17 Hun, 144; 111 Mass., 492.

Judgment and order affirmed.

Opinion by *Hardin, P.J.*; *Boardman, J.*, concurs.

*Follett, J.*, dissents, on the ground that the evidence excluded was admissible. "It goes to the very gist of the action." Defendant's "act was made up of his presence, and of what he said and did before the Grand Jury, and he had a right to show just what he testified to, and especially to show that he testified to plaintiff's own version of the transaction. This evidence not only goes to the foundation of the action, but it bears upon the question of malice."

#### SPECIFIC PERFORMANCE. TESTATOR'S DEBTS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Lucy E. White, *plff.*, v. James M. Kane, *def.*

Decided Feb. 2, 1885.

Where the testator devises his real estate charged generally with debts, the devisee, after three years from the granting of letters testamentary, can give to a *bona fide* purchaser a good title, free and discharged of such debts.

Where the entire estate is devised to the



widow charged generally with debts, and this is not declared to be in lieu of dower, she is not bound to elect; and her claim to dower, the estate being insolvent, is not inconsistent with the vesting of an immediate interest under the will, and is not a refusal of the devise.

Case submitted to the General Term.

The controversy arose under the first clause of the will of John H. White, in these words: "After all my lawful debts are paid and discharged, I give, devise and bequeath all my estate, real, personal or mixed, to my beloved wife, Lucy E. White, for her sole use, benefit and behoof forever." The plaintiff, Mrs. White, was sole executrix of the will. She contracted to sell to defendant certain real estate, owned by the testator, of which she claimed to be seized through her husband's will. She tendered to defendant a deed, which he refused to accept, on the ground that the lawful debts of her husband had not been paid, and that his estate was insolvent, and that plaintiff had not a title free from incumbrances. The testator died on February 26, 1877. On March 21, 1877, his will was proved and letters testamentary were issued to plaintiff. In August, 1879, the executrix filed her account, and in final settlement a decree was made in November, 1879. The contract for the sale of the real estate was made on July 14, 1884, and the deed was tendered and refused in September of that year.

*Elial F. Hall*, for plff.

*Weeks & Forster*, for deft.

*Held*, That if the testator devises

real estate charged generally with his debts, as in this case, the devisee, after the expiration of three years from the granting of letters testamentary, can give a good title, free and discharged of the testator's debts, to a *bona fide* purchaser.

*Further held*, That where the testator devises his entire estate to his widow charged generally with his debts, and such devise is not declared to be in lieu of dower, the widow need not elect; and a claim to dower, made by the widow, the estate being insolvent, is not inconsistent with the vesting in her of an immediate interest under the will, and is not a refusal of the devise.

Judgment in favor of plaintiff for specific performance of the contract by defendant, with costs of the action.

Opinion by *Van Vorst, J.*; *Sedgwick, Ch.J.*, and *Freedman, J.*, concur.

## SURROGATES.

N. Y. COURT OF APPEALS.

*Lambert, exr., respt., v. Craft, exr., applt.*

Decided March 3, 1885.

A petition for payment of a debt set forth that the claim had been presented to the executors and not rejected or paid, and that the statutory time had elapsed. The executors orally denied the allegations. Proof was given of presentation of the claim to one of the executors that it had not been rejected, and that the personal estate was sufficient to pay it. The executors did not ask for an accounting, or show the existence of other debts. The surrogate decreed payment. *Held*, No error.

A petition under § 2717 of the Code need

not set forth the facts which make out the debt.

The written answer of the executor under § 2718 must set forth facts showing that the validity or legality of the claim is doubtful, and also a denial of its validity or legality. Both conditions must concur.

On June 30, 1883, plaintiff, as executor of the will of L., presented a petition, which alleged that defendants had been appointed executors of the estate of C., of which estate L. was a creditor; that the claim had been presented to one of the executors of C., who was the one appointed to receive claims, and had not been rejected or paid; that more than eighteen months had elapsed since the appointment of C.'s executors. A citation was prayed for requiring them to show cause why they should not account, to the end that the claim of L. should be paid. On July 10, 1883, the return day of the citation, C.'s executors appeared in person and by attorney and orally denied the allegations of the petition. The petitioners thereupon presented proof tending to show that on June 1, 1883, their claim was presented to C., one of C.'s executors, and had not been rejected; that G., the other executor, was the sole acting executor; that the personal estate of C., amounting to more than enough to pay plaintiff's claim, came into the hands of C.'s executors. The latter did not apply for an accounting, or show the existence of other debts. The surrogate decreed payment of plaintiff's claim.

*Hal. Bell*, for applts.

*O. D. M. Baker* and *Peter M. Baum*, for respts.

*Held*, No error; that it is within the province of a surrogate, upon petition by a creditor, to direct payment of his debt, Code, §§ 2717, 2718; as the surrogate cannot pass upon disputed claims, 72 N. Y., 520; 88 id., 434; 92 id., 251, so the petitioner is neither required to state the facts which go to make out his debt, nor if stated would he be permitted to establish them. Jurisdiction of the surrogate is confined to undisputed claims, and is acquired by a presentation of a petition, Code, § 2516, by a creditor asking for payment of his debt, and the executor may be cited to show cause why a decree to that effect should not be made. § 2717. The citation, § 2516, brings in the executor, not to plead or respond to the petition, but by a verified written answer to set forth affirmatively facts, if he has any, which show that it is doubtful whether the petitioner's claim is valid and legal, "and also" denying its validity or legality absolutely, or upon information and belief. Both conditions must concur. § 2718; 94 N. Y., 574; 88 id., 122.

Judgment of General Term, affirming the decree of the surrogate directing payment of debt, affirmed.

Opinion by *Danforth, J.* All concur.

[Motion for re-argument denied March 24, 1885.—Ed.]

#### FOREIGN CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Duquesne Club of Pitts-

burgh, *applt.*, v. The Penn Bank of Pittsburgh, *respt.*

Decided March 4, 1885.

A corporation is not a citizen of the state in which it has its place of business, or of any other state, within the meaning of the provisions of the Constitution of the U. S. securing to the citizens of each state all the privileges and immunities of the citizens of the several states.

Appeal from order vacating attachment.

This action was brought by the plaintiff, which was a corporation created under the laws of the State of Pennsylvania, and having its place of business in Pittsburgh in said state, against the defendant, which was a like corporation, upon a cause of action which arose in the state of Pennsylvania upon a contract made and wholly to be performed, and the alleged breach of which occurred, within that state. The plaintiff procured an attachment, and the defendant, appearing by attorney for that purpose only, moved to vacate it, upon the ground that under § 1780 of the Code of Civ. Pro. the plaintiff could not maintain the action.

It was insisted by the plaintiff that said section was in conflict with the provisions of the Constitution of the U. S., which declare that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

*A. C. Brown*, for *applt.*

*James Watson*, for *respt.*

*Held*, That plaintiff, being a corporation of Pennsylvania, was not within the meaning of the Constitution a citizen of that or any

other state, and therefore might not claim, in another state, whatever rights and immunities are preserved by that instrument to the citizens of all the states.

That by § 1 of Art. 14 of the amendments to the Constitution, citizenship is expressly defined and declared as follows :

“ All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the U. S. and of the state wherein they reside.”

That this applies to natural, and not to artificial persons, and the decisions of the courts of the U. S., which have heretofore held that corporations are not citizens within the meaning of the Constitution, are therefore applicable to and controlling of the construction to be given to the new amendment. 8 Wall., 181; 18 How., U. S., 591; *id.* 407; 10 Wall., 410.

But that even if plaintiff was to be regarded as a citizen of Pennsylvania it would not have the right to maintain this action in our courts, because the right to maintain such actions against foreign corporations is one pertaining to residence only, and a citizen of our state who is not a resident of the state could not maintain the action under § 1780 of the Code; and therefore a citizen of another state who is not a resident of this state is equally denied the right to maintain such an action, 28 Hun, 369, and there is nothing therefore in the said section at all in conflict with the provisions of the Constitution.

Order affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

## EXECUTORS. TRUSTEES.

### N. Y. COURT OF APPEALS.

*In re* estate of Hood, deceased.

Decided March 3, 1885.

Testator, by his will, directed his executors to pay a certain sum to his wife during her life, and to divide the surplus when his youngest child came of age. The executors were nowhere designated as trustees, except in the appointing clause. *Held*, That it was not intended that they should act as trustees aside from the powers conferred on them as executors, and that the use of the term trustees in the appointing clause referred to the executors in their action under the trust created in the will.

On a final accounting the decree directed the executors to hold and invest the balance of the estate pursuant to the powers and directions of the will, but did not provide that they should thereafter become trustees. *Held*, That this did not discharge the executors as such, and that they could not discharge their liability as executors by any future investment.

In a case like this the surrogate alone has power to revoke letters.

Reversing S. C., 20 W. Dig., 316.

This was an appeal from a judgment of the General Term, reversing the decree of a surrogate revoking letters testamentary issued to F. H. as one of the executors of the last will and testament of A. H., deceased, and dismissing a proceeding to procure such revocation. The will of A. H. contained various provisions conferring authority upon his executors over his estate, and invested them with power to control the same, to receive and pay over moneys for the benefit of the legatees named therein, and to make a disposition there-

of. The testator, among other things, directed his executors, out of the proceeds arising from certain funds and other personal estate, and the proceeds of certain real estate, to pay a certain mortgage named, and out of the net income of said property, or the net income of said securities, in which the price of the same might be invested, to pay to his wife \$2,000 as long as she lived; and after other provisions, he directed his executors to divide the surplus, if any, when his youngest child arrived at the age of twenty-one years. After the death of his wife he ordered certain real estate to be sold, if not previously sold, and he disposed of the proceeds by specific bequest. By a subsequent clause he devised the residue of his estate to his executors, to sell and dispose of the same and divide the same into as many shares as he should leave children, paying over the income to each child until it attained the age of twenty-one years, and then to pay over the principal. In no part of the will were the executors designated as trustees except in the concluding clause, in which the testator declared that he thereby appointed his wife and son executors of his will, and trustees under the same.

*John J. Macklin*, for applt.

*Edward P. Wilder*, for respt.

*Held*, That it is evident from the provisions of the will that the testator did not intend that the persons named should act as trustees alone and aside from the power conferred upon them as executors, and in using the term trustees it is

a reasonable inference that he intended to refer to his executors in their action under the trust created in the will.

The executors having presented their accounts for settlement on January 6, 1869, the surrogate made a decree, which declares "that the balance of said moneys, being the sum of \$53,710.69, said executors shall hold and invest pursuant to the powers and directions in said last will and testament." It nowhere provides that from the date thereof the executors ceased to act as such and thereafter became trustees.

*Held*, That this did not discharge the executors as such. Even if under the will it was possible for the executors to have become trustees they could not have done so until there had been a final accounting and discharge by a decree of the surrogate from their position as executors, or by a direction in the decree that they take and hold the property as trustees, and by their entering upon the duty of trustees as distinct and separate from their functions as executors.

*Also held*, That as the executors held the funds of the estate as executors under the decree, they could not discharge the liability thus incurred by any future investment. 85 N. Y., 561; 1 id., 206; 95 id., 155.

*Laytin v. Davidson*, 95 N. Y., 263, in re Estate of Hood, 90 N. Y., 503, distinguished and explained.

The surrogate alone has power to revoke letters in a case of this character.

As to whether the executors

could become trustees solely, *quære*.

Judgment of General Term, reversing decree of surrogate, reversed, and decree of surrogate affirmed.

Opinion by *Miller, J.* All concur. *Earl, J.*, in result.

#### NEGLIGENCE. ESTOPPEL. N. Y. SUPERIOR COURT. GENERAL TERM.

*Richard Deeves, applt., v. Alexander Lockhardt, respt.*

Decided Feb. 2, 1885.

Payment without protest of a claim for services, e. g. as veterinary surgeon, after action brought thereon and before the return day of the summons, does not bar a subsequent action for damages by reason of unskillfulness, neglect, etc., in the rendition of the services. Such payment, etc., at the most is only matter of evidence to go to the jury on the question of the existence of negligence.

Appeal by plaintiff from a judgment against him for costs, on a verdict rendered under the direction of the court, and also from an order denying plaintiff's motion for a new trial.

The action was brought to recover damages from defendant, who was a veterinary surgeon, by reason of his alleged unskillfulness, carelessness and neglect in his treatment of plaintiff's horse. Defendant denied such unskillfulness and negligence. It appeared that before the commencement of this action plaintiff had been sued by defendant for payment of his professional services in the treatment of plaintiff's horse, and that before the return day of the sum-

mons plaintiff had paid defendants' demand. It was also admitted by plaintiff's counsel that at the time the payment was made there was no protest on the part of plaintiff, but that he had protested all along before. This admission the learned trial judge held to be decisive of the case, and he thereupon directed a verdict for defendant.

*Thornton, Earl & Kiendl*, for applt.

*W. C. Milnor*, for respt.

*Held*, Error. The principle of "*res adjudicata*" has no application to this case, because in the action brought by defendant against plaintiff no judicial determination of any competent court was had, no judgment was rendered or entered, no pleadings were used, no issue was raised between the parties to the action, no trial took place, no evidence was produced, and no proof of facts was made. 82 N. Y., 559.

There may be, no doubt, certain inconsistencies and contradictions between plaintiff's claim in this action to recover damages from defendant and plaintiff's previous voluntary payment of defendant's demand, from which an admission of the absence of negligence or malfeasance on the part of defendant might be inferred. 83 N. Y., 197; 41 id., 113; 75 id., 150. Such an admission, however, would not be an irrevocable or conclusive admission, binding plaintiff by way of estoppel. It would be, at most, only matter of evidence, which should have gone to the jury for what it was worth, and should have been considered by

them with all the other evidence in the case.

Judgment reversed; costs to abide the event.

Opinion by *O'Gorman, J.*; *Sedgwick, Ch.J.*, and *Truax, J.*, concur.

#### TENANTS IN COMMON. CONVERSION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Chauncey M. Soule, *applt.*, v. Cornelius Mogg, *respt.*

Decided Jan., 1885.

One of the patrons of a cheese factory may maintain an action against the salesman or agent of the patrons to recover his share of the proceeds of a check which the salesman has received, but failed to present within a reasonable time, whereby the check became worthless, the maker having become insolvent.

Appeal from judgment of County Court, reversing judgment in Justice's Court in favor of plaintiff.

Plaintiff was one of the patrons or a cheese factory, and brought this action to recover his share and the share of one W., who had assigned the same to him, of the proceeds of a check of \$472.30, drawn by one P. to the order of defendant, who was the salesman for the patrons.

It was alleged that defendant had been negligent in respect to his duty connected with the collection of this check. The check was given August 3, 1882, but was not presented for payment until after P. failed, September 11, 1882.

Had defendant presented it before it would have been paid.

The county judge reversed the judgment, on the ground that the action was not properly brought, without passing upon the other questions involved.

*Cornelius E. Stephens*, for applt.

*F. A. Lyman*, for respt.

*Held*, Error. The evidence in the court below and the verdict based thereon established the fact that it was the duty of defendant within a reasonable time to collect the check which he received from P., and also the fact that defendant did not perform the duty, but did negligently and improperly so conduct himself in respect to his duty in regard to the check that the same was not paid, and that by reason of the insolvency of P. the amount of money represented by the check became and was wholly lost to the patrons of the cheese factory. The recovery below is therefore based upon the negligence of defendant. We think defendant's liability was the same that it would have been if he had received in cash the sum of money represented by the check and carelessly and negligently lost it, or intentionally diverted it from the hands of the persons severally entitled to receive the same. This view of the case leads up to the conclusion, which we think was warranted by the evidence, "that plaintiff was a tenant in common of the money in the hands of defendant, and by reason of the injury sustained by plaintiff in consequence of the negligent acts of defendant, plaintiff has sustained

damages." We think the right to recover in this action is sustained by the authorities relating to the rights of one tenant in common to maintain an action for the conversion of his proportionate share in the property appropriated or lost. 2 Lans., 113. It is not very material whether it is called conversion of plaintiff's property or unlawful interference with his rights; in either case plaintiff is deprived of his property and the privilege of using it or selling it if he might see fit. He is damnified in the right of his property, and to the extent of the injury sustained has a right of action. 9 Hun, 420, and cases cited; 77 N. Y., 164.

If defendant had paid to plaintiff his proportionate share of the moneys represented by the check and taken a receipt therefor it would have discharged defendant's liability to that extent. Besides, it would have been in execution of the duty of defendant toward plaintiff, and all other persons interested in the moneys represented by the check. 16 Abb., 472; see also 54 N. Y., 521.

*Also held*, That § 1919 Code Civ. Pro., authorizing the bringing of actions in the name of officers of incorporated associations, does not aid the position which respondent takes, to wit, that plaintiff did not have a cause of action against defendant by reason of the negligence in respect to the check causing the loss of the money named in the check, and the amount which was defendant's portion of the money thus lost easily ascertained.

Judgment of County Court re-

versed, and judgment of Justice's Court affirmed.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

## WILLS. EXECUTORS.

### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re* settlement of accounts of Gilbert A. Woods, ex'r.

Decided Jan., 1885.

By testator's will the residue of the estate was given to his wife to be used and enjoyed by her during her life, and after her death it was given to his children to be equally divided between them. The will also directed the executors to collect in all debts, etc., due to testator, and to pay over the proceeds to the person or persons entitled thereto. The executors were not named as trustees, and no trust was in terms created. *Held*, that it was the duty of the executors to turn the personal effects into money and deliver the same to the widow that she might use and enjoy the same; that there was nothing requiring the executors to act as trustees, holding the body of the estate during the life of the widow.

Appeal from surrogate's decree settling the accounts of Gilbert A. Woods, as executor of John Woods, deceased.

John Woods died Dec. 2, 1852, leaving a will which was admitted to probate Feb. 23, 1852, in which appellant and one M. were named executors. M. died soon after.

By the eleventh clause of the will testator devised all his real estate and the residue of his personal estate to his wife, "to be used and enjoyed by her during the term of her natural life. And from and immediately after her death I give and devise the same to my sons,"

naming them, "their heirs and assigns forever, to be equally divided between them share and share alike." By the twelfth clause he directed his executors "to collect all debts, dues, obligations, claims and demands that may be found belonging to me at the time of my decease from any, every and all person or persons whomsoever, or so much as may prove collectible, so soon as the same can be legally and conveniently done, and the proceeds and avails thereof to pay over and deliver to the person or persons entitled to receive the same according to the conditions and provisions in this my last will and testament contained."

In or about the year 1853 the executor paid to the widow \$14,000, which she distributed to her seven sons named in the will, they assenting to this arrangement and giving their bonds to pay thereon interest to her to the amount of \$500 a year. The interest was paid by them for the first year, but not thereafter. The balance of the fund was afterward paid to the widow, who died in 1878.

The executor filed his account Jan. 29, 1881, and the sons above named, or the representatives of such as had died, contested the same. The surrogate found that the total charges against the executor amount to \$23,016.52, and allowed him as having paid to the legatees \$17,801.52 and his commissions, \$420.16, and ascertained an apparent balance of \$5,915, on which he allowed interest from May 24, 1878, the death of the widow, making in all \$7,386.01.



He found that the executor paid to the widow, between August 16, 1853, and October 1, 1864, the sum of \$3,665, and that such payments were without the consent of the residuary legatees, except the executor.

He found, as conclusion of law, that by virtue of the provisions of the will the widow was entitled to the annual interest on the balance in the executor's hands during her natural life, and that it was the duty of the executor to keep said balance invested and to pay her the income thereof; and also that the residuary legatees were entitled to said balance in equal proportion, and it was the duty of the executor to pay the same on the death of the widow, and that the executor had no right to pay the widow any sum in excess of said income without the consent of said residuary legatees, and decreed distribution of the balance found by him.

*D. A. King* and *S. C. Huntington*, for ex'r, applt.

*C. C. Brown*, for respts.

*Held*, Error. From the provisions of the will it is apparent that the design of the testator was that his wife should during her life have the use of that part of testator's estate not specifically given or devised absolutely. Construing the eleventh and twelfth provisions together, it is quite obvious that it was the intention of the testator that the executors should deliver the "rest, residue and remainder" of his personal estate to the widow, to the end that she might have the use and enjoyment thereof during

the term of her natural life. It therefore became the duty of the executors "to pay over and deliver to" her the avails of the personal estate. In reaching this conclusion we have also considered the phraseology of the will wherein the remainder of the estate at the close of the life of the wife is given to the seven sons. By this provision it is obvious that they were not to take until the close of their mother's life. Nor was the property to be divided "share and share alike" until the happening of her death. In the will no words are found creating a trust, nor appointing a trustee; in no part of the will are the executors denominated trustees. The executors were not directed to invest the funds, and we think the direction to pay over and deliver was imperative. 8 Abb., N. C., 413; 64 N. Y., 282; 2 Dem., 591; id., 626; 1 T. & C., 211; Redfield on Surr., 2d ed., 426.

*Calkins v. Calkins*, 1 Redf., 337, distinguished.

This case is unlike those where the direction is to pay over the income to the person entitled to the life estate. In such cases it is obvious that the testator did not intend that there should pass into the hands of the life tenant anything more than the income of the estate. 2 Barb. Ch., 211; 2 Paige Ch., 122. In such cases the executor cannot discharge his duty by paying the fund over to the life tenant. 68 N. Y., 485.

In short, we find nothing in the provisions of the will indicative of an intent on the part of testator that the executors should act as

trustees during the life of the widow, holding the body of the estate in their hands as executors or trustees merely for the purpose of division to the remaindermen.

Decree reversed and new hearing ordered, with costs of appeal to appellant, payable by respondents personally; costs of proceeding to abide final award by surrogate of costs.

Opinion by *Hardin, P.J.*; *Follett* and *Boardman, J.J.*, concur.

### CONVERSION. FRAUDULENT TRANSFERS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Nora Hough, *applt.*, v. Peter Bowe et al., *respts.*

Decided Jan. 5, 1885.

In an action for conversion where defendant seeks to justify under an attachment against the property of the person from whom plaintiff purchased the chattels in question, and plaintiff gives evidence of the sale and a valuable consideration paid by her before the levy, and also gives some explanation why there was not a visible change of possession, the case should be left to the jury, and the burden is on defendant to show the fraudulent nature of the transfer, in case the jury find a purchase for valuable consideration.

That plaintiff paid the attaching creditor's claim to the Sheriff does not bar the action, the payment being compulsory and under protest, and to enable plaintiff to recover possession of the property.

Such return and acceptance is not a satisfaction, but may be considered in mitigation of damages, the amount paid by plaintiff constituting special damages.

Appeal from judgment dismissing complaint.

The gravamen of the complaint was that defendants wrongfully

took certain goods of plaintiff, and the recovery sought was mostly for special damages. Defendants attempted to justify under an attachment issued against the property of plaintiff's nephew, one McCann. It appeared that prior to the levy upon the goods in question, there had been a sale (sufficient, at least, in form) of the goods by McCann to plaintiff, and there was evidence of a valuable consideration paid by plaintiff. But there was not sufficient, if any, evidence of an immediate and actual change of possession as required by statute.

*Louis J. Grant* and *Herbert Kettel*, for applt.

*Charles F. McLean* and *Joseph Ullman* for respts.

*Held*, That in consequence of the absence of such proof, the transaction was presumptively fraudulent against creditors. But it seems that in view of plaintiff's proof that she had purchased before the levy and paid a valuable consideration, the burden was cast upon the defendants to establish the fraudulent character of the transaction, in case the jury found a purchase for a valuable consideration. 88 N. Y., 418; 89 *Ib.*, 446. But in any event, upon the proofs given by plaintiff to the effect that she had purchased before the levy and paid a valuable consideration, and especially as she gave some explanation why there had not been a more visible change of possession than there was, the case was one for the jury, and the dismissal of the complaint was erroneous.

The complaint averred that by

reason of the unlawful taking and the detention of her property plaintiff was compelled to pay, and did pay, said claim to the sheriff in order to obtain the return of her goods, and plaintiff showed, among other things, that the payment made by her was not a voluntary one, but it was compulsory and under protest.

*Held*, That the payment by plaintiff of the attaching creditor's claim to the sheriff constituted no bar to the action.

The return of the goods and their acceptance by plaintiff cannot be deemed to constitute in law a complete satisfaction. As the case stands, the return of the goods and their acceptance by plaintiff go only in mitigation, and the money paid by plaintiff to secure such return is special damage.

Judgment reversed and new trial ordered; costs to appellant, to abide event.

Opinion by *Freedman, J.*; *Sedgwick, Ch.J.*, and *Van Vorst, J.*, concur.

#### RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The United States Trust Co., v. The N. Y., W. S. & B. RR. Co.

Decided Feb., 1885.

An order for the appointment of a receiver *pendente lite* of a defendant corporation in an action to foreclose a mortgage given by such corporation may be made in any county where the action is to be tried, notwithstanding Chap. 378, Laws of 1883. The statute of 1883 relates only to statutory receivers to wind up a corporation.

Appeal from order vacating

order for the appointment of receivers and appointing another receiver.

Action to foreclose a mortgage given by defendant to plaintiff, as trustee for holders of its bonds, and the venue was laid in Orange county. At the commencement of the action an order was made at the Orange Special Term, on notice, appointing Horace Russell and Theodore Houston receivers of the property embraced in the mortgage.

Thereafter, on motion of two bondholders who were not parties, the N. Y. Special Term granted an order requiring the parties and the receivers to show cause why the order appointing receivers should not be held void, and why some suitable person should not be appointed receiver. On the hearing the motion was granted.

It is claimed that the first order was void because it contravenes § 1 of Chap. 378, Laws of 1883, which provides that "Every application hereafter made for the appointment of a receiver of a corporation shall be made at a Special Term of the court in and for the judicial district in which the principal business office of the corporation was located at the commencement of the action wherein such receiver is appointed, or in and for a county adjoining such district, and any order appointing a receiver otherwise made shall be void." The principal business office of defendant was located in the first judicial district, and Orange county is in the second, and therefore it is claimed that the order granted in

Orange county is void under the statute.

*Held*, Untenable. The statute of 1883 relates only to statutory receivers to wind up a corporation and distribute its assets, and who become substantially statutory assignees. The act is entitled "An act in relation to receivers of corporations," and its whole scope and contemplation relates wholly to such receivers. It contains nothing in conflict with the general statutes relating to the venue of actions or motions, and only prescribes rules and regulations in relation to receivers of corporations such as the courts appoint in actions to close up their affairs. So viewed, it is in entire harmony with all other statutes and presents no inconsistency.

The venue in this action was properly laid in Orange county, and all motions and applications in the same may be made in that county. The receivers appointed herein were not receivers of the corporation; they were simply receivers *pendente lite* of the property embraced in the mortgage; and while it happens in this case that the mortgage comprehends all the property of the company, that is an independent fact which does not affect the principle. They were common law receivers for the protection of the property—simple custodians. They were clothed with no power to sell any of it, and they acquired no title to it. They could not close up the affairs of the company or distribute its assets. They simply hold possession of the property and receive the profits to

await the final judgment in the action and abide the order of the court, to the end that it may be appropriated in accordance therewith.

An order for the appointment of such receivers may yet be made in an action to foreclose a mortgage in any county where the same is triable, notwithstanding the statute of 1883.

Order reversed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

#### ESTOPPEL. LACHES.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Cornelia V. Phillips, *applt.*, v. The Highland Nat'l Bk. et al., *respt.*

Decided Feb., 1885.

One T., who was plaintiff's attorney in a foreclosure action, purchased the property himself and two years thereafter sold it and took back a mortgage which he afterwards assigned to defendant as security for loans. In an action to recover moneys paid on the mortgage and for an assignment thereof, *Held*, that plaintiff by failing to enforce her right to the property or the proceeds before the sale and assignment lost her right to the land or mortgage, and that she had no rights which could be enforced against the assignee of the mortgage.

Appeal from judgment entered on decision of Special Term.

One T. was the attorney for plaintiff in an action to foreclose a mortgage held by her and became the purchaser at the sale, taking the deed to himself, and two years later sold the same to honest purchasers and took back a bond and mortgage for \$1,800 in part payment. He was at that time in-

debted to one B. and assigned the bond and mortgage to him, but the assignment was never recorded, but was left with T.

Oct. 4, 1882, T. assigned the same bond and mortgage to the defendant bank as security for loans, and this assignment was recorded March 7, 1883. A payment of \$400 of the principal was made to T. in 1882 and he paid it to B.

This action was brought, T. being dead, to recover the \$400 from B. and to obtain an assignment of the bond and mortgage from the bank. The court at Special Term decided adversely to plaintiff and in favor of the bank as against B.

*Held*, No error. After T. became the purchaser of the property at the mortgage sale plaintiff could have obliged him to yield the same to her, and after he sold the same and received the proceeds it was her right to have them handed over to her, and she could have enforced her right by legal action. But she made no move in that direction. The sale of the land was made to a *bona fide* purchaser, and she lost her right to procure that, and the assignment of the mortgage was made to an innocent party for value and the same result ensued. 55 N. Y., 41; 94 Id., 189.

Bailey and the Bank stand equal on their equities, but the recording act must decide between them. B.'s assignment was not recorded, and was therefore void as against the assignment of the Bank, which was recorded.

It follows that plaintiff had no rights which can be enforced against these defendants and that

the Bank must retain possession of the mortgage.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Pratt, J.*, concurs; *Barnard, P.J.*, dissents.

## LEASE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Galen W. Lovatt, *respt.*, v. Ellen F. Watson et al., *appls.*

Decided March 4, 1885.

A landlord by instituting summary proceedings to evict his tenant affirms the lease as it exists, and is precluded from seeking a reformation thereof as a defense to an action brought to restrain the prosecution of such summary proceedings.

It is not necessary to file a new note of issue and serve a new notice of trial after the service of a supplemental complaint.

Appeal from judgment of Special Term, and from order directing the trial to proceed.

The defendants, who were the landlords of the plaintiffs, commenced summary proceedings in a District Court to evict them. The determination was in favor of the defendants herein, but before the warrant could be executed this action was commenced to restrain the prosecution of such proceedings and to enforce the specific performance of the contract of hiring. A preliminary injunction was granted, but was dissolved, and the plaintiff herein evicted. He appealed, however, to the General Term of the Court of Common Pleas, where the judgment of ouster was reversed, and he was allowed to set up such eviction and

reversal in a supplemental complaint in this action, to which the defendants interposed an answer, in which, among other things, they asked for a reformation of the contract on account of alleged fraudulent representations on the part of plaintiff, so that it should be declared null and void.

*A. B. Conger*, for applts.

*E. P. Wilder*, for resp't.

*Held*, That defendants, in attempting to evict plaintiff, instituted a proceeding by which the contract was affirmed as it existed, and in which they sought its construction, and that prevented any reformation of the contract itself. 77 N. Y., 498.

When the case was called for trial, defendant urged that it was irregularly upon the calendar because no new note of issue had been filed nor notice of trial served since the supplemental pleadings had been put in. The judge directed the trial to proceed, and from this decision defendants appealed.

*Held*, When leave is given under § 554 of the Code of Civ. Pro. to put in a supplemental complaint in addition to the former pleading, it is not a substitute for the original complaint, but a further complaint, and assumes that the original complaint is to stand. Code of Civ. Pro. § 554; 2 Wait's Pr. 472, and cases cited. And there was no necessity, therefore, to file either a new note of issue or to serve a new notice of trial.

Judgment and order affirmed.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

## AMENDMENT. TITLE. TRUST.

N. Y. COURT OF APPEALS.

Price, *resp't.*, v. Price et al., ex'rs, applts.

Decided March 3, 1885.

The complaint alleged that plaintiff allowed defendant P. to take notes belonging to her, to be secured by a mortgage given to him by the other defendants; that P. delivered them to the other defendants, who destroyed them, and asked to be adjudged owner of the mortgage to the extent of the notes. The referee allowed the complaint to be amended by striking out the allegation as to the destruction of the notes, they being produced. *Held*, No error; that the amendment did not affect the issue or bring in a new cause of action.

One of these notes was payable to plaintiff, and admissions of P. were shown to the effect that he received it from plaintiff to give to the other defendants. *Held*, That the legal and equitable title was strown to be in plaintiff, and that the mortgage was impressed with a trust in favor of plaintiff for the amount due her.

On November 22, 1869, defendants R. executed a bond and mortgage to the defendant P. for \$50,000, in consideration of the surrender of promissory notes of a like amount. It appeared that these notes, to the amount of \$10,000, belonged to plaintiff, and were at the request of P. delivered to him to be secured by the mortgage, and upon his agreement to hold the same in trust for her to that extent. The complaint in this action alleged that plaintiff allowed P. to take the notes, and that he immediately gave them to the defendants R., one of whom in plaintiff's presence destroyed them. The complaint further alleged that no

part of said \$10,000 has been paid to plaintiff, and for reasons stated she believes and charges that defendants intend to dispute their indebtedness and cheat and defraud her of her rights in the premises. She asked that she be adjudged to be the owner of \$10,000 of said bond and mortgage, and that said sum be ordered paid to her as it falls due, and that meanwhile defendants be enjoined from doing anything to her prejudice. At the close of plaintiff's case the referee allowed the complaint to be amended by striking out the allegation as to the destruction of plaintiff's notes, the same having been produced by defendants R. on the trial. Defendants claim that this was error.

*Charles Hughes*, for applt.

*Frank J. Mather*, for resp't.

*Held*, Untenable, the object of the action being to protect and enforce plaintiff's interest growing out of the facts alleged, and their existence being denied the amendment in question did not affect the issue raised or bring in a new cause of action; as the power and discretion of the referee in such matters has no other limit, his decision is not reviewable. 70 N. Y., 180; 33 id., 92.

Upon the merits, the referee found the execution of the bond and mortgage as alleged, and the other allegations in favor of the plaintiff to the extent of \$5,000. It appeared that among the notes surrendered when the bond and mortgage were executed there was one dated October 15, 1869, payable three months after date to

plaintiff's order for \$5,000, in the handwriting of one of the R.'s, and upon it was indorsed a statement, in the handwriting of P., that it was surrendered and formed \$5,000 of the mortgage executed by defendant R. November 22, 1869. It was also proved by one A. that, shortly after said mortgage was executed, P. stated to him that R. having applied for a loan he told him he had not any ready money, but perhaps his wife had, and he saw her and she let him have \$10,000.

*Held*, That a case was made for the consideration of the referee; that the legal and equitable title was shown to be in the plaintiff.

*Robinson v. Cushman*, 2 Den., 149; *Pease v. Dwight*, 6 How., U. S., 200, distinguished.

The legal presumption is that the note was delivered either to the payee named therein (plaintiff), or some one authorized by her to receive it, and the referee having refused to find that the note was delivered to defendant P., it stands as a note made for value and delivered to the payee. This is sufficient to sustain plaintiff's title. 8 Cow., 77; 2 Abb. Ct. App. Dec., 492.

The bond and mortgage in question are impressed with a trust in favor of plaintiff for the amount due her, whether by express agreement of the mortgagee or otherwise is immaterial. *Story's Eq. Jur.*, § 1255; 69 N. Y., 133.

A party cannot on appeal have the benefit of an exception to the admission of evidence and at the

same time deprive his adversary of the evidence excepted to.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

### PROMISSORY NOTE. ENDORSER.

N. Y. COURT OF APPEALS.

*Parker et al., ex'rs, appls., v. Stroud et al., ex'rs, respts.*

Decided March 3, 1885.

A demand of payment by letter is insufficient to charge an endorser on a promissory note; he can only be charged by demand made at the time and place indicated by the note.

The holder of a note payable on demand is not chargeable with neglect for omitting to make a demand within any particular time.

Reversing 8 C., 18 W. Dig., 454.

This action was brought in March, 1881, against the maker and endorser of a promissory note. The endorser loaned defendant, and upon his death his executors were substituted as defendants. The note in suit was as follows:

"\$1,100. Canastota, N. Y., Nov. 23, 1870. On demand I promise to pay to the order of Charles Stroud eleven hundred dollars, at the Importers' and Traders' National Bank, New York City, value received with use.

V. W. MASON."

Endorsed "Charles Stroud."

It appeared that interest was paid on this note until January 20, 1876. Payment of the note was demanded at the bank at which it was made payable February 20,

1880, and refused, and due notice thereof given the next day to the endorser. The only defense pleaded is the statute of limitations.

*Earl M. Stimson*, for appls.

*M. E. Barlow*, for respts.

*Held*, That the endorser's contract being, if on demand at a certain place named the maker did not pay the note, he would, upon notice of its non-payment, pay it, no cause of action would arise against him until after a demand made at the time and place stipulated and a failure of the maker to pay. 17 Johns., 248; 19 id., 392; 37 Barb., 10. The holder is not chargeable with neglect for omitting to make such demand within any particular time. 23 N. Y., 28; 60 id., 265; 41 id., 581; 47 id., 519; 88 id., 339.

It was claimed that certain letters, addressed by the holder of the note to the maker, containing requests to make payment thereon, operated as a sufficient demand of payment to cause the statute of limitations to commence to run against the note in favor of the endorser.

*Held*, Untenable. 29 Me., 188; 18 Conn., 361; 61 Me., 244; 1 Parsons on B. and N., 372.

It is essential to the validity of a demand that it shall be made by a person authorized to receive payment and deliver the instrument upon which it is founded, and the person on whom it is made must then be afforded an opportunity by immediate payment or performance to protect himself from the consequence of a breach of con-



tract. 1 Daniels on Negotiable Instruments, 518; 1 N. H., 80; 50 N. Y., 410; 3 Kent's Com., 11 ed., 128; Chitty on Bills, 12th Am. ed., 415; 1 Parsons on B. and N., 371; 6 R. L., 259; 3 Whart., 116; 4 McCord, 593; 11 Iowa, 476. A demand of payment by letter is insufficient to charge an endorser on a promissory note; he can only be charged by demand made at the time and place indicated by the note.

Judgment of General Term, dismissing complaint, reversed, and new trial ordered.

Opinion by *Ruger, Ch.J.* Allconcur.

#### ARREST. PRACTICE.

##### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James W. Whitney et al., *appls.*, v. Adolphus Hoffstadt et al., *respts.*

Decided March 4, 1885.

The practice of presenting a single set of affidavits entitled in several different actions by different plaintiffs against the same defendants, for the purpose of obtaining separate orders of arrest in each action is not to be encouraged.

Appeals from orders vacating orders of arrest granted in these actions upon the ground that defendants, since the making of the contract sued upon, had disposed of their property with intent to defraud their creditors. The orders of arrest vacated were granted in seven actions by different plaintiffs against the same defendants upon a single set of affidavits, which were entitled in the seven actions.

*Charles H. Smith and A. H. Amidown*, for *appls.*

*R. S. Newcombe*, for *respts.*

*Held*, That this mode of procedure, though perhaps technically correct, is not to be encouraged, however convenient it might be professionally.

That fraud was not so satisfactorily proved as to warrant the reversal of the orders appealed from.

Opinion by *Brady, J.; Davis, P.J.*, concurred, as did also *Daniels, J.*, who held that the affidavits were very irregularly made, inasmuch as several actions could not be combined in the manner done in these cases for distinct orders of arrest in each case.

#### AGENCY. INSURANCE.

##### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Rhoda Clark v. The Glens Falls Ins. Co.

Decided April, 1885.

An insurance agent can authorize his clerk to countersign policies and the act of the clerk in such case is the act of the agent and binds the company just as effectually as if it were done by the agent in person, even though the policy requires that it shall be countersigned by the authorized and commissioned agent.

Where the proofs of loss required by the terms of a policy are defective, the neglect of the insurance company to reject and return them within a reasonable time is a waiver of any defect or deficiency therein.

Where proofs of loss were forwarded June 19th, 1879, were received by the company June 21st, 1879, and the company retained the proofs furnished until the 28th day

of the same month, two days after the time for furnishing proofs had expired, without objecting to them, and then returned them on the ground that the proofs were not made by plaintiff. *Held*, That it was for the jury to determine whether there was or not such neglect on the part of defendant as to constitute a waiver.

Appeal by defendant from order of Special Term, setting aside a nonsuit and granting a new trial.

The action was upon a policy of insurance against loss by fire covering plaintiff's barn. The policy in suit was countersigned and delivered by M. D., a clerk in the office of D. C., the authorized and commissioned agent of defendant. M. D. was authorized by defendant's said agent D. C. to contract new insurance, renewals, to make monthly and daily reports and collect premium on policies and renewals issued.

The proofs of loss were signed and verified by plaintiff's husband and agent. The signing and verification of the proofs was an act which the policy required the claimant to personally perform.

The proofs were forwarded to defendant on the 19th day of June, 1879, and were received by defendant as early as the 21st day of the same month. Plaintiff then had five days within which to furnish other proofs if those should prove unsatisfactory to defendant. Defendant retained the proofs furnished until the 28th day of the month, two days after the time for furnishing proofs had expired, without objecting to them, and then returned them, upon the ground, among others, that the proofs were not made by plaintiff.

*Dailey & Bentley*, for plff.

*Erastus P. Hart*, for deft.

*Held*, In determining the propriety of a nonsuit the court is legally bound to assume the truth of the facts which the testimony legitimately tends to prove. 3 Barb., 110; 20 N. Y., 492; 35 id., 9-25; 5 id., 496. Assuming, then, that M. D. was authorized by defendant's agent to issue this policy, the question arises whether defendant's agent could delegate such power to his clerk. Story states the rule as follows :

"The authority is exclusively personal unless, from the express language used or from the fair presumptions growing out of the particulars or of the usages of trade, a broader power was intended to be conferred on the agent." Story on Agency, § 14; Dunlap's Paley on Agency, 175, n. 1; 1 Wait's Actions and Defences, 235; 2 Kent's Com., 633.

In the case of *Bodine v. Exchange Fire Ins. Co.*, Judge Earl, in delivering the opinion of the court, says :

"We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or se-

curities, or to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person." 51 N. Y., 123. See also 14 Hun, 458; 18 id., 230; 63 N. Y., 463; 68 id., 437; 85 id., 478. I infer that the principle upon which it was held in the Bodine case that the clerk of an agent of an insurance company might perform the acts enumerated was that "from a fair presumption growing out of the transaction, or of the usage or custom of the insurance business, a broader power than mere authority to act personally was intended to be conferred." If within that principle the clerk can contract for risks, he can, I think, perform the act of countersigning the policies within the same principle. But it is said that the policy requires that it shall be countersigned by the authorized and commissioned agent. True, but within the Bodine case the countersignment by the clerk is the act of such agent.

*Held further*, That notice by plaintiff's husband was sufficient, there being no objection or offer to return it upon that ground. 76 N. Y., 459. It was for the jury to determine whether there was or not such neglect on the part of defendant as to constitute a waiver.

Order granting new trial affirmed upon the opinion of Mr. Justice Martin at Special Term.

Mem. by *Boardman, J.; Hardin, P.J.*, and *Follett, J.*, concur.

## WATER-COURSES. DIVER-SION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jacob W. Mitchell, *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided April, 1885.

When a corporation or individual attempts by artificial means to interfere with the natural action of water to serve its or his own purposes, he must see to it that it shall be done in such a way as shall not unnecessarily do an injury to his neighbor.

Appeal from judgment in favor of plaintiff, entered upon a verdict, and from an order denying a motion for a new trial.

The RR. Co. erected an embankment near the mouth of Dry Brook, whereby the surface waters were prevented from passing below the RR. as they had before done. It then opened a ditch to carry said waters along the upper side of the RR. to the southeast along the side of its track, and on its own land, to a point below plaintiff's land, which was adjoining. For a series of years this ditch was kept open and the water discharged through it without unnecessary injury to plaintiff. But after 1877 defendant failed to keep open the ditch, whereby the water was accumulated in unusual quantities in a depression of the surface of the ground and by reason thereof overflowed plaintiff's land, causing the injury for which this action is brought. This act resulted in carrying surface waters by a ditch, and by its failure to keep the ditch open dis-

charging an unusual and unnatural quantity of water upon plaintiff's land.

*D. C. Robinson*, for applt.

*S. S. Taylor*, for respt.

*Held*, That the facts bring the case within those decisions forbidding such interference with the flow of surface water to the detriment of others. *Andrews, J.*, in *Barclay v. Wilcox*, 86 N. Y., 147, says the owner of land "may get rid of it [surface water] in any way he can, provided only he does not cast it by drains or ditches upon the land of his neighbor." To the same effect is *Noonan v. City of Albany*, 79 N. Y., 470; 67 id., 267; 65 id., 341; 20 W. Dig., 528. The same principle applies to highway officers who stop up culverts and carry the surface water upon the upper side of a highway for some distance and then through a culvert discharge the same in unnatural and unusual quantities upon the lower proprietor to his injury. 63 Barb., 185.

Judgment and order affirmed, with costs.

Opinion by *Boardman, J.*; *Hardin, P.J.*, concurs; *Follett, J.*, not sitting.

#### AGENCY. FRAUD.

##### N. Y. COURT OF APPEALS.

*Bacon*, admrx., *respt.*, v. *Clafin et al.*, *applts.*

Decided March 3, 1885.

Where an insolvent, offering a compromise requests some creditor to accept the offer and advise its acceptance by other creditors, the latter by doing as requested does not become the agent of the debtor to make the settlement or commit a fraud upon those he advises to accept.

Where such creditor was afterward employed by other creditors to induce the debtor to pay them a sum in addition to the offer, in an action to recover the agreed compensation for such services, *Held*, That a motion for nonsuit on the ground that a double agency existed and thereby a fraud was practiced on defendants was properly denied; that the question of fraud was for the jury to determine.

The complaint in this action set up a special contract, whereby plaintiff was to go to Canada and see E. B., the senior member of the insolvent firm of E. B. & Co., which was largely indebted to defendants, and procure him to pay \$24,000, in cash, in addition to an offer of a compromise of fifty cents on the dollar of said indebtedness, which had been previously made to defendants on behalf of said firm, defendants agreeing that if plaintiff succeeded in procuring said payments to be made they would pay him \$4,000 and his traveling expenses and disbursements. The complaint alleged performance on plaintiff's part and refusal by defendants to pay plaintiff as aforesaid. It appeared that plaintiff was a friend of E. B., and also a creditor of the firm of E. B. & Co., which facts were known to defendants, who were also aware that plaintiff desired to have a compromise by E. B. & Co. and their creditors effected, and had urged the acceptance of one already offered, and defendants supposed plaintiff knew where E. B. was. There was no proof that plaintiff was in any way employed by E. B. & Co. Plaintiff exerted his influence on E. B. and fulfilled his contract with defendants. Defendants moved for a nonsuit on the ground that a

double agency existed on the part of plaintiff, involving the exercise in some degree of judgment and discretion, and so imposing upon him the performance of inconsistent duties, and thereby a fraud was practiced on defendants. The motion was denied.

*Charles W. Gould*, for appls.

*Aaron Pennington Whitehead*, for resp't.

*Held*, No error. Whether the evidence justified defendants' assumption and whether a fraud was thereby practiced was to be determined by the jury. It was inherent in the contract that there could be no breach of trust or confidence by plaintiff towards defendants as it respected the terms of compromise, for they reposed none in him.

Where an insolvent offering a compromise requests some creditor, upon whose friendship and goodwill he thinks he can rely, to accept the offer for himself and advise its acceptance by the other creditors, and the latter promises to do so and fulfills the promise, he does not thereby become the agent of the debtor to make the settlement or commit a fraud upon those he advises to accept.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo, J.*, not voting.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*James Bigler, applt., v. Edwin Atkins, resp't.*

Decided March 4, 1885.

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Where a party refers the individual with whom he may be dealing to another person for information, that which may be obtained in consequence of the reference is evidence against the party making it.

Appeal from a judgment recovered on the dismissal of the complaint at circuit.

This action was brought for alleged deceit on the part of defendant in the sale of a ship to plaintiff, through which deceit it was alleged that plaintiff was induced to purchase said ship and whereby plaintiff claimed to have suffered damage on the ground that the ship was not as represented. The complaint was dismissed at the close of plaintiff's evidence upon the ground that he had failed to make out a case against defendant.

It appeared that during the negotiations for the sale of the vessel defendant referred plaintiff to the captain, who, he stated, would show him the vessel and could tell him all about her, and plaintiff proposed to prove what the captain had said concerning the vessel in a conversation which plaintiff subsequently had with him upon the subject. This evidence was excluded.

*Dexter A. Hawkins*, for applt.

*E. W. Taft and R. D. Benedict*, for resp't.

*Held*, That so far as the exclusion of this evidence may have proceeded upon the ground that plaintiff could not prove further representations as to the condition of the vessel after he had subscribed the memorandum of the contract for her purchase, the deci-

sion was probably correct; but that as to any other material information which plaintiff had acquired in the course of his inquiry it was erroneous, for where a party refers the individual with whom he may be dealing to another person for information, that which may be obtained in consequence of the reference is evidence against the party making it. 1 Camp., 364; 13 C. B., N. S., 663; 1 M. & W., 435; 3 C. & P., 532; 10 Jones & Sp., 44; 8 Wall., 480.

That there was sufficient evidence in support of plaintiff's case to entitle him to have it submitted to the jury.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.; Davis, P.J., and Brady, J., concur.*

#### CORPORATIONS. CREDITOR'S ACTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Christian T. Christensen, *respt.*,  
v. Amos T. Eno, *impl'd, applt.*

Decided March 4, 1885.

When stock of a corporation has been issued to a stockholder paid up to a certain amount when such amount has not in fact been paid, and bonds of the corporation have been issued to him without consideration, a judgment creditor of the corporation can maintain an action against such stockholder to recover the amount so unpaid on the stock and the market value of the bonds at the time they were so delivered.

In such an action the plaintiff's judgment is probably competent *prima facie* evidence against defendant of the existence of the indebtedness for which it purports to have been recovered.

Such an action is not one to reach or enforce an indebtedness or obligation existing in favor of the corporation, but is equitable in its nature, and is not barred until ten years after the time when it accrued.

The fact that the indebtedness of the corporation to plaintiff did not exist at the time of the delivery of the stock and bonds to defendant is no defense to the action.

Bonds of a corporation which have a saleable value for the whole or some part of their par value, and may therefore be turned into money in the treasury of the company, are for all practical purposes assets to the extent of their productive power.

Appeal from judgment of Special Term.

Defendant Eno was a stockholder of the Illinois and St. Louis Bridge Company, and in 1871 the directors of said company issued to him 25 shares of the capital stock of said company paid up to the extent of \$40 a share, when in fact said \$40, or any part of it, had not been paid. Subsequently the company called in the \$60 per share remaining unpaid, and contemporaneously with the payment of the call delivered to defendant a number of its second mortgage bonds, then of the market value of \$775.59 apiece, without payment of any consideration, but simply to refund to him the money he had so paid for said stock. The plaintiff was a judgment creditor of the corporation, an execution upon whose judgment had been returned unsatisfied, and this action was brought to recover from defendant the amount unpaid on the stock and the market value of the bonds delivered to him. It was claimed by defendant that there could be no recovery in this action because it was barred by the statute of limita-

tions, and because the indebtedness of the corporation to plaintiff did not exist at the time of the transactions complained of, and that as to the bonds, the right of plaintiff to recover rested upon the assumption that they were assets of the corporation, and that they were not such assets. The debt of the corporation to plaintiff was not proved except by proof of a judgment recovered against it in Missouri, and it was claimed by defendant on appeal that such judgment was not competent evidence as against him of the fact of such indebtedness.

*A. P. Man*, for applt.

*Tracy, Olmstead & Tracy*, for respt.

*Held*, That the objection as to the competency of the judgment was sufficiently answered, first, by the fact that no such objection was taken at the trial, and second, that the indebtedness to plaintiff was virtually admitted by the answer and the theory upon which the case was tried, and that, moreover, it was more than probable that, within the principle of 76 N. Y., 15 and 88 N. Y., 313, the judgment itself should be taken as *prima facie* evidence against defendant of the indebtedness for which it purported to have been recovered.

That plaintiff did not seek to reach or enforce in this case an indebtedness or obligation of the company, and which it could have enforced by action, but he predicated his right to recover altogether upon equitable causes of action which he, as a creditor of the corporation, was entitled to enforce, although the latter could not, and

that, therefore, the action was not affected by the statute of six years, but was barred only by the ten years' limitation applicable to equitable actions, within which time it had been brought.

That defendant by receiving the stock with 40 per cent. endorsed as paid, when in fact nothing whatever had been paid, had for all practical purposes withheld from the treasury of the corporation and kept for himself that sum, which any creditor could justly say should be made an asset of the corporation available for his benefit, and that by receiving the bonds of the corporation without consideration, and realizing their sale value, he took the amount of such value out of the treasury of the company, and that such bonds were for all practical purposes assets of the corporation to the extent of their productive power, and that the creditors of the corporation were entitled to recover the proceeds of such bonds in the hands of defendant.

That the objection that the indebtedness to plaintiff did not exist at the time the transactions complained of occurred was answered by the fact that the withholding of the amount unpaid on the stock and the proceeds of the bonds was a continuing one, impairing the power of the corporation, both at the time of the occurrence of the wrong and at all times since, to pay its creditors, and that any debt which the corporation incurred while such impairment continued was prejudiced by such withholding, and hence the right to pursue the remedy adopted by

plaintiff was not affected by the fact that the indebtedness of the corporation to him did not accrue until after the delivery of the stock and bonds to defendant.

Judgment affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

#### COMMON CARRIERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John E. Furman, *respt.*, v. The Union Pacific R.R. Co., *applt.*

Decided March 4, 1885.

When goods are delivered to the first of several connecting carriers under a bill of lading directing that the consignees be notified of the arrival of the goods but not directing the delivery of the goods to them, and the goods are transferred to the last of said carriers without notification to him of the provision in the original bill of lading directing notice only of the arrival of the goods to be given to the consignee, said carrier will not be guilty of a conversion of the goods by delivering them to the consignee.

Appeal from a judgment recovered on trial before the court.

The judgment was recovered for the value of 100 bags of peanuts delivered to the defendant by the Hannibal & St. Joseph R.R. Co. for transportation to and delivery at the City of Denver. The peanuts were first shipped by the owners at Norfolk in the State of Virginia by a steamer employed by the Baltimore Steam Packet Co. By the bill of lading the consignees, Zucca Bros., were to be notified on their arrival at Denver, but the carrier was not directed to deliver the peanuts to them.

When they arrived at Denver they were delivered by the defendant to Zucca Bros., who soon afterward became insolvent and failed to pay for the peanuts. This delivery was considered to have been a conversion of the property by the defendant. It appeared that when the peanuts were delivered to the defendant by the Hannibal & St. Joseph R.R. Co. no copy of the original bill of lading or other notification that Zucca Bros. were not entitled to the unqualified delivery of the property, but a "transfer sheet" was given to it indicating them to be the consignees of the property and as such entitled to its delivery to them.

*Artemus H. Holmes* and *George H. Adams*, for *applt.*

*Robert L. Harrison*, for *respt.*

*Held*, That the defendant's relation to the property and its obligations for its carriage and delivery were to be determined by what transpired when it was delivered to it by the Hannibal & St. Joseph R.R. Co. That the extent of its obligations were made to appear by the transfer sheet received by it, and that obligation was literally performed by carrying the peanuts to Denver and delivering them to Zucca Bros. That the act which resulted in the delivery of the peanuts to Zucca Bros. without exacting the payment of their price was caused by the default either of the Hannibal & St. Joseph R.R. Co. or of some other preceding carrier by which the terms of the contract originally made for the transportation of the



property had been withheld from the defendant and for that act the defendant was not responsible.

B'k of Commerce v. Bissell, 72 N. Y., 615, distinguished.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.; Davis, P.J., and Brady, J., concur.*

### LANDLORD AND TENANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Fanny Spellman, *applt.*, v. Patrick Bannigan, *respt.*

Decided April, 1885.

An action for negligence against the landlord cannot be maintained by the tenant for personal injuries caused by the giving way of stairs unless the landlord knew the stairs were unsafe to use or from the facts and circumstances in the exercise of ordinary care and prudence he should have known of their dangerous condition.

The contract of a landlord to put or keep in repair does not contemplate personal injuries which may follow a breach of the contract and indirectly or remotely grow out of it. Such damages are accidental and remote, nor is a landlord liable to his tenant for a breach of his contract to repair unless he had notice of the necessity for such repairs and then only after a reasonable time for him to make such repairs.

Appeal from judgment dismissing plaintiff's complaint, entered upon the decision of a referee.

Action to recover for injuries caused by the giving way of a stairway in a building hired of defendant.

*S. M. Lindsley*, for *applt.*

*Pomeroy, Townsend & Quin*, for *respt.*

*Held*, It is not quite clear whether the cause of action is founded on the breach of contract to repair and put in good condition or for the negligence and wrong of defendant in putting plaintiff in the possession of premises while in a dangerous condition, whereby she fell and was injured. If the action be for negligence it cannot be maintained, because there is no evidence that defendant built the stairway and then left it in a dangerous condition; nor is there any evidence that defendant knew of the dangerous condition of the stairs, or could have acquired such knowledge in the ordinary and prudent conduct of his business. Unless he knew the stairs were unsafe to use, or from the facts and circumstances in the exercise of ordinary care and prudence he should have known of their dangerous condition, defendant cannot be made liable as for a tort. *Woods Land. & Ten.*, 620; 31 Hun, 28. He cannot be made liable for plaintiff's injuries in an action for a breach of contract to put in repair. 43 How., 333, 348, 351. The contract to put or keep in repair does not contemplate personal injuries which may follow a breach of the contract and indirectly or remotely grow out of it. *Sedg. on Dam.* 4th ed., 216. Such damages are accidental and remote. Nor would a landlord be liable to his tenant for a breach of his contract to repair unless he had notice of the necessity for such repairs, and then only after a reasonable time for him to make such repair. *Woods Land. & Ten.*, §§ 377, 379; *Moak's*

Van Sant. Pl, 3d ed., 364 ; 56 N. Y., 398.

Judgment affirmed, with costs.

Opinion by *Boardman, J.* ; *Hardin, P.J.*, and *Follett, J.*, concur.

### ASSIGNMENT. PARTIES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Spencer Ervin et al., *applts.*, v. The Oregon Railway & Navigation Co., *respt.*

Decided March 4, 1885.

A claim against a foreign corporation by a non-resident can be assigned to a resident of this State for the purpose of enabling him to sue and thus to avoid the disability which would otherwise exist against a non-resident under § 1780 of the Code of Civil Procedure.

Appeal from a judgment of the Special Term dismissing the complaint.

This action was brought by the plaintiffs as stockholders of the Oregon Steam Navigation Co. to have a sale of its property to the defendant declared void.

All the plaintiffs in this action with the exception of one were non-residents of the State. The defendant was a foreign corporation and the action was not one of those specified in § 1780 of the Code of Civil Procedure as one which could be maintained by a non-resident against such a corporation, and for that reason the complaint was dismissed as to all the non-resident plaintiffs. The complaint was dismissed as to the resident plaintiff upon the ground that he had become a stockholder in the Oregon

Steam Navigation Co. by an assignment of stock from a non-resident for the purpose of enabling him to become a plaintiff in this action, and for that reason the complaint was dismissed as to him.

*Thomas H. Hubbard*, for applts.

*Artemas H. Holmes*, for respt.

*Held*, That a claim against a foreign corporation by a non-resident could be assigned to a resident of this State for the purpose of enabling him to sue and thus to avoid the disability which would otherwise exist against a non-resident plaintiff. 28 Hun, 269 ; 68 N. Y., 30 ; 72 id., 575 ; 61 id., 614 ; 44 id., 228 ; L. R., 3 Ch. App., 337, 343, 353 ; L. R., 2 Ch. App., 459 ; 1 Heming. & Miller 89, p. 493 ; 4 DeGex., F. & G., 126.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.* ; *Daniels, J.*, concurs.

### APPEAL.

N. Y. COURT OF APPEALS.

*In re* opening of Flushing Ave. in Long Island City.

Decided March 10, 1885.

A motion to set aside an order appointing commissioners was denied and an appeal taken. Pending the appeal another motion was made to set aside said order and also an order confirming the report, on the ground that the acts under which the proceedings were had were unconstitutional. This motion was denied and appeal taken, which was heard and the order of denial affirmed. The first appeal was then dismissed on the ground that appellants were concluded by the order on the second motion. *Held*, error.

A motion was made in the above

entitled matter to set aside an order dated July 5, 1881, appointing commissioners of estimate and assessment. That motion was founded upon an alleged irregularity in granting said order. It was denied and an appeal was taken to the General Term. Pending that appeal, another motion was made to set aside the order of July 5, 1881, and also an order made November 14, 1881, confirming the report of the commissioners appointed. The affidavits upon which the second motion was made set out the facts relating to the irregularity claimed in respect to the order of July 5, 1881, substantially as in the papers used on the first motion, but the main ground relied upon for setting aside the order and subsequent proceedings was that the acts under which the improvement of Flushing Ave. was made were unconstitutional and void. The second motion was denied by an order of Special Term dated December 16, 1882, but on what particular ground does not appear. From an order of the General Term affirming said order an appeal was taken to this Court where the orders of General and Special Terms were affirmed. 95 N. Y., 135. After such affirmation the present appellants moved the argument at General Term of the appeal from the order denying the first motion. The General Term dismissed the appeal on the ground that the appellants were concluded by the order made on the second motion from raising the question as to the irregularity of the order of July 5, 1881.

The present appeal is from the

order of dismissal. It does not appear from the papers presented that the question of the regularity of order of July 5, 1881, was decided on the second motion.

*Frank E. Blackwell*, for applts.

*J. Ralph Burnett*, for respts.

*Held*, That the dismissal of the appeal was erroneous, although upon the papers the right to the relief sought seems technical and not substantial. The right to have the appeal in the first motion considered was not precluded by the order in the second motion.

Order of General Term, dismissing appeal, reversed.

Opinion by *Andrews, J.* All concur.

## STATUTES.

### N. Y. COURT OF APPEALS.

*In re* altering and widening of Main St., in the village of Sing Sing.

Decided March 10, 1885.

Section 38 of Chap. 568, Laws of 1880, being but a re-enactment of the provisions of the charter of 1859, and expressly adopting the system of the Revised Statutes in respect to the number of jurors required, the provisions of the amendment of 1875 to the Revised Statutes are not to be deemed incorporated therein.

This was a certiorari to review the determination of the trustees of the village of Sing Sing in altering and widening Main street in said village. The street was altered and widened on the certificate and oaths of twelve freeholders, as prescribed by the Charter of the village, (Laws 1880, Chap. 568, § 38). The relators claim the jury should

have been drawn in the manner prescribed by chapter 431 of the Laws of 1875, amending the general highway laws of the State in relation to the manner of laying out highways in the several towns of the State. Section 38 of the charter of 1880 was a mere re-enactment of the provisions in the charter of 1859, and expressly adopts the system of the Revised Statutes as originally enacted in respect to the number of jurors required to certify to the necessity of the street when laid out through an orchard, garden or building. It provides, among other things, that in all proceedings for laying out, opening and widening streets in the village, the trustees who are made commissioners of highways for the village, shall conform to the provisions of Article 4, Title 1, Chapter 16, Part 1 of the Revised Statutes (the general highway act) so far as the same can be made applicable. The necessity of the highway was regularly certified by twelve freeholders under the system which prevailed prior to the amendment of the Revised Statutes in 1875, which requires only nine freeholders. The act of 1880 was to consolidate, amend, etc., the charter, and the provisions of the charter of 1859 as to laying out, opening and widening highways were re-enacted, only inconsistent acts were repealed.

*Smith Lent*, for appls.

*John Gibney*, for respt.

*Held*, That as § 38 of the charter of 1880 was a mere re-enactment of the provisions of the charter of 1859, and as the charter of 1880, so

far as it embraced the provisions in the charter of 1859, is a mere consolidation act, and as § 38 expressly adopts the system of the Revised Statutes as originally enacted in respect to the number of jurors required, the legislature cannot be held by the reference in said section to the Revised Statutes to have intended to incorporate into it the amendment of 1875.

Order of General Term, affirming order of Trustees altering etc., street, affirmed.

Opinion by *Andrews, J.* All concur.

## APPEAL.

### N. Y. COURT OF APPEALS.

*Weeks et al, appls, v. Cornwell et al, respts.*

Decided March 10, 1885.

An appeal will not lie to the Court of Appeals from an order of General Term modifying an interlocutory judgment in a specified manner and affirming it as modified. The judgment entered on such order remains simply an interlocutory judgment.

This was a motion to dismiss an appeal from an order of the General Term modifying an interlocutory judgment in the above entitled action, the order specifying the particular interlocutory judgment to be entered and affirming the judgment of the Special Term as thus modified.

*Flamen B. Candler, A. T. Thomas and C. H. Ostrander*, for motion.

*A. H. Stoiber, B. S. Weeks and S. H. Thayer*, opposed.

*Held*, That the appeal should be

dismissed ; that the judgment entered upon the decision of the General Term remains simply an interlocutory judgment, and an appeal to this Court was therefore not proper. 94 N. Y., 248.

Appeal dismissed.

*Per curiam* opinion. All concur.

### CORPORATIONS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Caleb E. Whitaker, *applt.*, v. John M. Masterton et al., *respts.*

Decided March 4, 1885.

The trustees of a manufacturing corporation are not rendered personally liable for the debts of such corporation, either under § 2 of chap. 333 of the Laws of 1853, or § 15 of the act of 1848, providing for the incorporation of such companies, by the mere omission to specify separately in their annual report the amount of stock issued for cash and the amount issued for property purchased by the company. It is not necessary to make such separate statement to comply with § 12 of the said act of 1848.

In order to render the trustees of a manufacturing corporation personally liable for the payment of its debts under § 15 of the act of 1848, *supra*, upon the ground that they have made a false report, it must appear that they have signed the report knowing it to have contained a materially false representation, and that it was made in bad faith or for some fraudulent purpose.

Appeal from a judgment recovered on trial at Special Term.

This action was brought by plaintiff as a judgment creditor of the Imperial Skirt Manufacturing Co., upon whose judgment an execution had been issued and returned unsatisfied, to recover pay-

ment of his debt from defendants as trustees of said corporation, on the ground, first, that they had failed, in 1878, to file the annual report required by § 12 of the act of 1848 providing for the incorporation of manufacturing companies ; second, that they made a report in said year which was false in its material representations, and was known by them to be so ; and third, that they had, as trustees of the corporation, made false representations to plaintiff. It appeared that on January 18, 1878, defendant made and filed a report in the following form :

"Amt. of capital of Co., \$50,000 00

" " paid in, 50,000 00

All of which has been paid in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business, and for which stock to the amount of the value thereof has been issued by the company. Amount of the existing debts of the company do not exceed \$38,500."

It was claimed by plaintiff that this was not a proper report, inasmuch as it did not state separately the amount of stock issued for cash and the amount of that issued for property.

*Geo. V. N. Baldwin*, for *applt.*

*Flamen B. Candler* and *J. K. Hayward*, for *respts.*

*Held*, That the report complied with § 12 of the act of 1848, *supra*, for it stated the amount of the capital of the company, that it had all been paid in, and the amount of its existing debts, which is all that is required by said section.

That, while it is true that § 2 of

chap. 333 of the Laws of 1853 requires the report to state the amount of stock which may have been issued for property, the omission itself to do so will not render the trustees making the report personally liable for the debts of the company under this section of the act. That said act has not itself so provided or declared, and their liability must accordingly depend upon the force and effect to be given to § 15 of the act of 1848, *supra*, which does not declare the trustees to be personally liable on account of their omission to distinguish the amount paid in cash from the amount of stock issued for property purchased by the company, but it has declared the officers of the company who shall make any report which shall be false in any material representation, knowing it to be false, liable for all the debts of the corporation contracted while they are officers; and that it is essential to the maintenance of an action of this description that defendants should appear to have signed the report knowing it to have contained a materially false representation, and that it was made in bad faith or for some fraudulent purpose, 80 N. Y., 128; 86 id., 95, 103; 89 id., 122, and that the evidence failed to establish that fact. *Glens Falls Paper Co. v. White*, 18 Hun, 214, not followed.

That none of the causes of action presented by the complaint was sustained by the evidence.

Judgment affirmed.

Opinion by *Daniels, J.; Davis, P.J.*, and *Brady, J.*, concur.

## STATUTE OF FRAUDS. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

George A. Porter et al., *respts.*, v. Richard Penn Smith et al., *appls.*  
Decided Jan., 1885.

In an action to recover on an executed contract for the sale of personal property the statute of frauds is not the standard by which the admissibility of evidence as to the price for which the goods were to be sold is to be determined, and therefore an unsigned memorandum as to the price endorsed on the printed conditions of sale is admissible.

Where the case on appeal does not show that it contains all the evidence bearing on the finding sought to be reviewed the court will assume that the evidence was sufficient to sustain the finding.

An exception to a finding of fact or to a refusal to find as requested is not authorized.

Appeal from judgment in favor of plaintiffs, entered on the report of a referee.

Action to recover moneys overpaid on a contract for the purchase of coal.

Defendants agreed in April, 1879, to deliver to plaintiffs, who were manufacturers of salt, 10,000 tons of pea and dust coal during the season of navigation. They delivered 9,045 gross tons, on account of which plaintiffs advanced \$13,588.57.

Defendants claimed a balance due them on the contract.

The referee found that 8,502 tons were used in manufacturing salt, producing 357,764 bushels of salt, or 42 $\frac{4}{11}$  bushels per ton of coal used, which at 3 $\frac{1}{4}$  cents per bushel equals \$1.3675 $\frac{4}{11}$  per ton of coal so used, or for the 8,502 tons \$11,627.33.

543 tons not so used at \$1.68 per ton.	912.24
Total amount at price found by referee.	12,539.57
Advanced by plaintiffs,	13,588.57

Referee's report for  
plaintiffs, \$1,049.00

Defendants claimed that the coal was sold for \$1.57 per ton, and in case more than 42 bushels of salt were produced from each ton of coal used plaintiffs were to pay 3½ cents per bushel for the excess produced up to a point which should produce \$1.68 per ton.

At the minimum price claimed by defendants 8,502 tons at \$1.57 per ton, \$13,348.14

680 bushels of salt manufactured in excess of 42 bushels per ton at 3½ cents, 22.10

543 tons not used in manufacturing salt at \$1.68 per ton, 912.24

Total price of coal as claimed by defendants, 14,282.48

Advanced by plaintiffs, 13,588.57

Amount claimed by defendants, \$693.91

On the trial the referee admitted in evidence under objection an unsigned memorandum as to price endorsed on the printed conditions of sale.

*Waters, McLennan & Dillaye*, for respts.

*Sedgwick, Ames & King*, for appls.

*Held*, No error. The memorandum was admissible. 14 N. Y., 584; 33 Barb., 392; Reed's Stat. of Frauds, §§ 341, 344. This is not

an action to recover damages for failing to perform a contract defended on the theory that the contract sued on is void by the statute of frauds. Neither party claims that the contract of sale is invalid; on the contrary, each seeks to recover of the other on the ground of a valid contract performed in whole or in part, the only dispute being at what price the coal delivered was sold for. The statute of frauds is not the standard by which the admissibility of evidence bearing on this question is to be determined.

The only remaining question presented was whether the finding of fact as to the price agreed upon was against the evidence. The case did not show that it contained all the evidence or all bearing on the finding sought to be reviewed.

*Held*, That when it does not so appear, this court will assume that the evidence was sufficient to sustain the findings of fact. 1 T. and C., addenda 4; id., add. 2; 2 id., 370; 59 N. Y., 649; 2 T. and C., 324, 329; 3 id., 783; 20 Hun, 472; Ballou v. Ballou, 4th Dept., Oct., 1884. It is apparent that an appellate court cannot intelligently consider a question of fact unless all of the evidence bearing upon it is before the court, and when a question of fact is sought to be reviewed it should be stated in the case that it contains all of the evidence or all bearing upon the question of fact sought to be reviewed. Under the Old Code exceptions could be taken to findings of fact and were available; but not under the present code. Under the pres-

ent code an exception to a finding of fact is unavailing unless there is no evidence to sustain it, when it becomes a ruling of law, and an exception is available. Code Civ. Pro. §§ 992, 993; 3 Civ. Pro., 171; 28 Hun, 639; 79 N. Y., 224. If requests to find facts are preferred pursuant to § 1023 and the court or referee refuses to make any finding whatever, an exception may be taken. Code § 993. But an exception to a finding of fact or an exception to a refusal to find a fact as requested is not authorized by the present code. Whether error has been committed in this respect is to be determined by this court upon the evidence and the requests to find facts. Whether a finding of fact is against the evidence may be determined by this court without an exception. 3 Civ. Pro., 171; 28 Hun, 639. It is the duty of appellant to present a case so made up and settled that the error complained of be manifest and not leave the court to indulge in presumptions to overthrow decisions.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### GENERAL ASSIGNMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Horace B. Claflin et al., *respts.*,  
v. Clinton H. Smith et al.

Decided March 10, 1885.

By the commencement of a creditor's action to set aside a general assignment the judgment creditors in whose immediate favor it is prosecuted acquire a lien on the debts, demands and other choses in

action of the assignor as equitable assets out of which they are entitled to be paid prior to other judgment creditors who have taken no proceedings to avoid the assignment or to reach such assets; but judgments are liens upon the assignor's real property in the order of their docketing, and the commencement of an action to set aside such assignment by one judgment creditor cannot deprive a prior judgment creditor of the lien of his judgment upon the real estate of the debtor when that judgment was recovered and docketed before the commencement of the creditor's action and he was in no form a party to it.

When a judgment has been recovered setting aside a general assignment in an action brought for that purpose by a judgment creditor, other judgment creditors are entitled to be brought in under such judgment to share, according to their rights, in the distribution of the debtor's estate to be made thereunder.

This action was brought by the plaintiffs as judgment creditors of defendant, C. H. Smith, to set aside a general assignment for the benefit of his creditors made by him, and a judgment was entered therein setting aside such assignment and directing that the different creditors who were parties to the action should be paid out of the proceeds of the assigned property, by the receiver thereof to be appointed under such judgment, in the order in which their judgments were respectively recovered.

After the entry of such judgment one T., a judgment creditor of the assignor who was not a party to the action, moved to correct and amend said judgment, and to be permitted to come in under it, and make proof of his claim before the receiver; and, from the order denying this motion, this appeal was taken.



*David J. H. Willcox*, for applt.

*Otto Horwitz* and *Daniel Clark Briggs*, for respts.

*Held*, That the direction contained in the judgment for the payment of plaintiff's claims prior to the claims of other judgment creditors was without objection so far as it affected the debts, demands and other choses in action of the assignor; for, by the commencement of the creditors' action, the persons in whose immediate favor it was prosecuted acquired a lien upon such claims and demands as equitable assets out of which they were entitled to be paid prior to other creditors who had taken no proceeding to avoid the assignment or to reach such assets. 16 N. Y., 543; 48 Id., 27, 33; 87 Id., 585; 2 Paige, 567.

1 Hun, 655, distinguished.

That, if the assignment was void as to plaintiffs by reason of a defective acknowledgment, as was determined by the judgment, it was equally void as to appellant, and his judgment became a lien upon the debtor's real estate, and entitled to priority of payment out of the proceeds of the real estate over the creditors whose judgments were afterwards recovered, as were those of several of the plaintiffs in the action; and, as he was not a party to the action, and his judgment was recovered before its commencement, he could not be deprived of that priority by the adjudication which was made therein. 19 N. Y., 369.

But that, without finally determining the rights of the parties in the real estate of their debtor, ap-

pellant was entitled to come in under the judgment and have his rights presented and considered before the fund obtained by the receiver should be distributed and paid out; and, if any directions should be required restraining or limiting the effect of the judgment itself, that would be done when the rights of all the parties in the fund should be made to appear before a direction for its distribution would be finally made.

Order reversed, and appellant permitted to come in and prove his claims under the judgment, but as an appeal had been taken from said judgment, the order is not to be entered unless and until after the affirmance of the judgment by this Court or the Court of Appeals.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.*, concur.

#### APPEARANCE. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Isaac Hamburger et al., respts., v. Orlando B. Baker, applt.*

Decided March 4, 1885.

When it does not appear by the complaint in an action that defendant was not, at the time of the commencement of the action, a resident of the state, and had no property and had not been served with a summons in the state, such facts may be relied upon as a defence by way of answer; and an answer setting up such a defence, subscribed by an attorney as "attorney for the defendant," is not a general appearance in the action.

Under the rules of pleading established by the Code of Civil Procedure, the defence of want of jurisdiction is not waived by setting up other defences in the answer. After the assignment of a chose in action

by a defendant, it cannot be seized through the instrumentality of an attachment issued against him.

Appeal from a judgment recovered on the verdict of a jury directed by the court.

The answer of defendant in this action set up as a defence that he was not, at the time of the commencement of the suit, or at the time of serving his answer, a resident of the State of N. Y., and that he had no property, and had not been served with a summons in this state. It then proceeded to set up other defences, and was subscribed by Robt. L. Harrison, as "attorney for the defendant." It appeared upon the trial that defendant had previously had a demand against the Imperial Fire Insurance Co. of London, against which a warrant of attachment had been issued in this action, but that previous to the attempt to commence the suit the demand itself had been assigned by him to another person. The court regarded the answer as a general appearance, rendering defendant amenable to its jurisdiction.

*Robert L. Harrison*, for applt.

*Ferdinand Kurzman*, for respt.

*Held*, That where the facts showing want of jurisdiction set up in this answer do not appear from the complaint they may be relied upon as a defence by way of answer, Code of Civ. Pro., § 488 Sub. 1, and § 498, and since the answer could only be made and served by defendant appearing and making it in person, or by the employment and through the intervention of an attorney subscribing such an answer

as this was subscribed, was not such an appearance in the action as gave the court jurisdiction over the person of defendant, and as he had no property within the state, he could not be proceeded against by way of attachment, for after the assignment of a chose in action by the debtor, it cannot be seized through the instrumentality of an attachment issued against him. 61 N. Y., 583; 24 Hun, 257; 13 Abb. N. C., 173.

That by setting up other defences in addition to that of lack of jurisdiction the right to insist upon the latter was not waived, although it would have been under the former rules of pleading. 1 Chitty on Pl., 6th Am. Ed., 491; 3 Wend., 258; 6 id., 649; for by § 507 of the Code of Civ. Pro., that rule was changed, and defendant was permitted to add to the defence of want of jurisdiction as many others as he deemed himself entitled to insist upon, without being in any way, either expressly or by implication, required to abandon the effect of the facts relied upon to show that the court had no jurisdiction over him. 4 Kernan, 465.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.*, concur.

#### ATTORNEY AND CLIENT. REFERENCE.

N. Y. SUPERIOR COURT. GENERAL TERM.

• *Elias M. Gregory, respt., v. Arnet Seaman et al., applts.*

Decided Dec. 1, 1884.

An attorney-at-law, as distinguished from counsel, may have a running account with his client, and the dealings between them may be such that the relation of debtor and creditor will not be grounded solely upon the facts of each service, but will regard a lawful practice of first charging in account the indebtedness and giving a credit appropriate to the expectation that several items of indebtedness may be liquidated from time to time as the account is rendered, or that partial payments be made from time to time.

Accordingly, *Held*, That a reference of an action on an attorney's bill should be ordered in a proper case.

Appeal from order of reference.

The action was on an attorney's bill transferred to plaintiff, which bill was annexed to the complaint and embraced numerous items for services and disbursements in seventeen different actions and proceedings, to each of which items a separate charge was affixed. It appeared that payments had been made on account of said services.

*Nelson Smith*, for applt.

*S. F. Gregory*, for respt

*Held*, That an attorney-at-law may have, as a matter of fact, a running account with his client. He may deal with his client and his client with him so that the relation of debtor and creditor will not be grounded solely upon the facts of each service, but will regard a lawful practice of first charging in account the indebtedness and giving a credit appropriate to the expectation that several items of indebtedness may be liquidated from time to time as the account is rendered, or that partial payments be made from time to time. It is a relation somewhat different from that of counsel, who

are usually to be paid for each piece of service as a whole. Whether the relations of the parties to this case were of the kind just alluded to, was under the pleadings and bill of particulars a question of fact for the judge below. On this point there is no reason to disturb his decision, and it further follows that in such a case an order to refer is not erroneous.

*Further held*, That if the trial of the issues presented by the complaint will involve the taking of a long account they may be referred, although there is a defence of fraud or negligence. 52 N. Y., 590.

Order affirmed, with \$10 costs.

Opinion *per curiam*; *Sedgwick*, Ch.J., and *Van Vorst*, J., sitting.

## EXONERATION OF BAIL.

N. Y. COMMON PLEAS. GENERAL TERM.

James Walsh, *respt.*, v. Charles Schulz, *impl'd*, etc., *applt.*

Decided March 13, 1885.

An application to exonerate bail is governed by the Code as it exists when the application is made.

The right of bail to be exonerated upon the death of defendant is limited to cases where the death occurs before the expiration of the time to answer in the action brought against the bail.

Appeal from an order of the General Term of the City Court affirming an order denying a motion to exonerate bail.

*Charles Wehle*, for applt.

*James Flynn*, for respt.

*Held*, That it is not the Code as it existed when the undertaking was entered into, but the Code as it was

when the application was made to exonerate the bail, that is to govern. If the legislature, as the appellant argues, in the amended sections, 600 and 601, intended that the courts should have power to relieve the bail whenever the death of defendant occurs, pending the suit against the bail, as was the case under section 191 of the former Code, it is presumed that they would have left the provision as it was, it being the part of wisdom to leave what is well enough alone; but they have recast the previous provision, and limited the right of the bail to be exonerated upon the death of defendant to the case of his death before the expiration of the time to answer in the action brought against the bail, and if any other construction is to be put upon the plain language of sections 600 and 601 that responsibility must be assumed by the tribunal of final resort.

Order affirmed.

Opinion by *Daly, Ch.J.*; *Larremore* and *Van Hoesen, JJ.*, concur.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Richard Marshall, admr., *respt.*,  
v. Charles E. Bresler et al., *applts.*

Decided Feb., 1885.

A complaint which alleges that one A. died abroad leaving B. and others her sole heirs and next of kin; that B. gave to defendant a power of attorney to collect her share of the estate; that thereupon defendant was appointed administrator of A.'s estate, collected it and converted the same to his own use; that B. has since died, and that plaintiff was appointed

administrator of her estate, states facts sufficient to constitute a cause of action for the wrongful appropriation of the fund.

Appeal from judgment entered on order overruling demurrer to the complaint.

Action brought by plaintiff, administrator, etc., of Louisa Marshall, deceased, to compel defendant B. to account for moneys received by him for plaintiff's intestate.

The complaint alleged that Amelia Schultz, an unmarried lady, died in Germany intestate, leaving a large amount of property, and leaving Louisa Marshall and others her sole heirs and next of kin; that Louisa, who resided in this state, executed a power of attorney to defendant authorizing him to collect her portion of the estate for her; that in pursuance of said power of attorney defendant was appointed sole administrator of the estate of Amelia Schultz in Germany and received all her estate; that after the payment of all the debts there remains a balance of many thousand dollars, which defendant has brought into this state and converted to his own use in the purchase of property, one-half of which belonged to Louisa Marshall, the client and principal of defendant in said power of attorney. The complaint also alleged that Louisa Marshall died intestate; that letters of administration on her estate were duly issued to plaintiff, and that he thereupon qualified and entered upon the discharge of his duties.

Defendant demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and also that plaintiff has no legal capacity to sue, for the reason that a cause of action accruing in the lifetime of the intestate must be brought by the administrator.

*Lauterbach & Spingarn*, for appls.

*H. Benedict*, for resp't.

*Held*, That neither of these grounds of demurrer are tenable. The cause of action set out in the complaint is full and perfect against defendant. This action is against defendant, not as administrator founded on a liability of his intestate, but as an individual, predicated on his wrongful use and misappropriation of trust funds. If this plaintiff cannot maintain an action against defendant for the distributive share of his intestate in the estate which came to defendant and has been converted by him to his own use, then he will retain the same by virtue of his misappropriation. Plainly, there is no such law, and the complaint is sufficient. 7 Paige, 239; 32 Barb., 190; 33 id., 92.

Neither is the second ground of the demurrer well assigned, for the reason that the action is brought by the administrator. The action is by Richard Marshall, administrator, etc., of Louisa Marshall, deceased; the judgment will be entered under the same title, and when plaintiff collects the money which defendant by his demurrer admits is in his hands, he will hold the same in his representative

capacity as administrator of the estate of Louisa Marshall.

Order and judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

#### ANIMALS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Thomas Buck, *applt.*, v. Mrs. Alexander Moore, *resp't.*

Decided Feb., 1885.

The owner of a dog who permits it to follow her on the street is not liable for damages caused by its killing another dog while so following her.

Appeal from judgment of County Court, reversing a justice's judgment in favor of plaintiff.

Action to recover damages caused by the killing of plaintiff's dog. It appeared that defendant had a large dog, and that while it was following her on the street it went into plaintiff's yard and seized and killed a small dog belonging to plaintiff.

Plaintiff recovered a judgment, which was reversed by the County Court on appeal.

*A. W. Seaman*, for applt.

*M. Compton*, for resp't.

*Held*, No error. The case seems to fall within Rule 3 of Moak's Underhill on Torts—that no person is legally responsible for any act or omission not attributable to active or passive volition on her part. In other language, no person is responsible for an involuntary injury. If while following its owner along a highway a dog discovers game and follows it the owner is

not liable. By the common law the owner of a dog was not responsible for the damage done, and it required a statute in our state to create such liability. The reason of the rule was that the killing and worrying of sheep could be anticipated or expected to result from a dog running at large. This rule applies here. Defendant could not know or believe that her dog would kill or injure the dog of plaintiff simply because she permitted her dog to follow along the street.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

#### MISTAKE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Irving Snell, *applt.*, v. Selim Newell et al., *respts.*

Decided Jan., 1885.

One B., who was owing plaintiff and defendants, delivered to the former goods under an agreement that the avails should be applied to plaintiff's claim and afterwards to defendants', and plaintiff paid to defendants the balance due them under the agreement. Thereafter one C. claimed and took away a portion of the goods. *Held*, That plaintiff could not recover from defendants for the portion so taken away without showing that it belonged to C. and that the title acquired from B. had failed.

Appeal from judgment of County Court, reversing judgment of Justice's Court.

In 1876 plaintiff and S. were co-partners, and defendants were also co-partners. One H. B. being indebted to both firms, it was agreed

between the firms and H. B. that he should deliver lumber to plaintiff's firm, the avails thereof to be first applied in payment of the claim of that firm and afterwards in payment of defendants' claim. Prior to July, 1876, H. B. delivered lumber under this contract, which was measured and found sufficient to pay the claim of plaintiff's firm and \$62.07 on defendants' claim, which was credited, and in November, 1876, was paid to defendants by plaintiff's firm.

In September, 1876, H. B. failed, and thereafter one A. B. claimed and carried away part of the lumber of the value of \$40.

Plaintiff, as assignee of his firm, sued and recovered judgment in Justice's Court for \$40, the value of the lumber carried away. Upon the trial, however, he failed to show that the lumber so taken away by A. B. belonged to him. The judgment was reversed by the County Court.

*H. Clay Hall*, for *applt.*

*Sheldon & Petrie*, for *respts.*

*Held*, No error. For aught that appears A. B. may have been a mere trespasser. The lumber had been delivered by H. B., and plaintiff's firm and defendants had treated it as his. Plaintiff's firm had measured it and taken it into possession as their lumber. Before they or their assignee could recover it was necessary to show that the title had failed.

Again, the Justice committed a fatal error in receiving the declarations of H. B. as against defendants and their objection.

Judgment affirmed, with costs.

Opinion by *Follet, J.*; *Boardman, J.*, concurs; *Hardin, P.J.*, not voting.

### HUSBAND AND WIFE. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Simon Uertz, *respt.*, v. The Singer M'fg. Co. et al., *appls.*

Decided Jan., 1885.

In an action by a husband to recover for injuries to his wife, his right to recover is limited to such special damages as he has sustained thereby. Evidence as to such damages is inadmissible unless they are pleaded; but the question of admissibility in that respect is not raised by an objection that the evidence is "incompetent and immaterial."

When the right of recovery is limited to actual special damages proved, the verdict should be set aside if it greatly exceeds the damages established by the evidence.

Appeal from judgment in favor of plaintiff, entered on verdict, and from order denying motion for new trial.

Nov. 2, 1880, plaintiff received from the Singer M'fg. Co. a sewing machine and executed a writing acknowledging its receipt and that he was to pay \$5 per month rent, and when the monthly payments so made amounted to \$50, or if he paid \$40 in four months, the machine was to be his. In case of failure to make the payments the company or its agent had the right to take the machine. In Feb., 1883, plaintiff had paid \$40 and refused to pay more, claiming that this sum was the price agreed upon. The company's agent demanded the machine, and on plaintiff's refusal brought replevin and

delivered the papers to defendant D., a constable, for service. D., with one M., an employee of the company, took the machine by virtue of the process, but the constable failed to thereafter serve plaintiff with the papers required by § 2922, Code Civ. Pro. Some papers and money were in the drawer of the machine when taken, but were afterwards returned. Plaintiff's wife resisted the officer, and in the struggle over the removal of the machine it is claimed she was assaulted and injured by the constable. Neither the company nor its general agent, defendant J., was present, and it is not claimed that M. assaulted plaintiff's wife or incited the constable to do so.

The complaint contained three causes of action in a single count, not separately stated: 1, for injuries to real property, without specifying the injuries; 2, for taking chattels of the alleged value of \$65, claiming \$2,000 for these two causes of action, and, 3, for personal injuries inflicted on plaintiff's wife, for which \$2,000 was claimed.

The complaint contained no allegation that the wife's injuries were permanent, nor that she would be less able to discharge her duties to plaintiff in the future, nor that erysipelas nor any unusual condition ensued from the injuries. The court, however, permitted evidence to be given of these facts under defendants' objection to the evidence "as incompetent and immaterial."

*S. M. Lindsley* and *Wm. Townsend*, for *appls.*

*J. W. Boyle*, for resp't.

*Held*, A plaintiff cannot recover the general damages occasioned by an injury to his wife, child or servant, for these damages belong to and are recoverable only by the person injured. In such a case the law does not imply that plaintiff has sustained damages, and his right to recover is limited to such special damages as he has sustained, which are the gist and only foundation for the action; and unless such damages are alleged no cause of action is alleged, and only such as are alleged can be proved if duly objected to. The evidence was inadmissible under the complaint had it been objected to on that ground. 1 E. D. Smith, 453; 55 Hun, 541; 4 Den., 461; 2 Thomps. on Neg., 1250, §§ 32, 33; 2 Sedg. on Dam., 7th ed., 606; 1 Chitty's Pl., 16, Am. ed., 411, 515; Mayne on Dam., ch. 17; Heard Civ. Pl., 310-314. But no objection to this class of evidence was interposed on the ground that it was inadmissible under the complaint. The objection interposed "as incompetent and immaterial" is insufficient to raise the question. 3 Hun, 539; 45 N. Y., 753.

The court was not asked to instruct the jury upon the right to recover for the prospective loss of services, and no exception was taken to the instructions given. It is undisputed that the goods taken were within a few days returned to and accepted by plaintiff. It was not shown that actual damages were caused by taking the goods or by the entry on the premises; and for these causes of action

plaintiff was entitled to recover but nominal damages. The court, however, was not asked to so rule or to so instruct the jury.

It is claimed that a nonsuit should have been granted in favor of the Singer Manufacturing company and J.

*Held*, Untenable. If these defendants directed a wrongful entry, or wrongfully directed the goods to be taken, they were liable for the damages caused by these acts, and a nonsuit on the whole case would not have been proper. The court was not asked to rule that J. and the company were not liable for the assault and battery and for a nonsuit as to this cause of action, so that this question is not before us. The constable, under his process, was authorized to use sufficient force to take the goods, and is not liable unless he used excessive force.

Plaintiff recovered a verdict for \$1,130 damages, which the trial court refused to set aside as excessive.

*Held*, Error. If more than nominal damages were sought to be recovered, evidence of the amount of services lost and of their value should have been given. 90 N. Y., 26. Plaintiff proved that he had been put to certain expenses, amounting to less than \$100. These he had a right to recover. The value of the wife's services before the injury, or their extent, were not very clearly established. How much her ability had been diminished up to the date of the trial was not very clearly shown. About the only fact shown was that she



had not done her washing, as formerly. The injuries were not, in themselves, permanent. No marks or apparent physical injuries resulted from the affray. No physician testified that any disability traceable to the injury existed at the time of the trial, or that the injuries actually sustained would be likely to produce future inability to discharge her duties to her husband. The evidence as to whether her illness, between the date of the affray and the trial, was attributable to this cause or some other is not very conclusive in its character. The physicians do not swear that in their opinion erysipelas resulted from the injuries. A verdict for personal injuries and abuse willfully inflicted, causing mental and physical suffering, is rarely set aside as excessive; but this is not such a case, and when the right of recovery is limited to actual special damages proved, the verdict may and should be set aside if it greatly exceeds the damages established by the evidence.

Judgment and order denying new trial reversed, and new trial granted upon defendants paying costs of last trial; in which case costs of this appeal abide event. If costs are not paid within time limited, judgment affirmed with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## NEGLIGENCE. RAILROADS.

N. Y. COURT OF APPEALS.

Werle, adm'r, *respt.*, v. The L. I. RR. Co., *applt.*

Decided March 3, 1885.

Plaintiff's intestate took passage at a way station on a train composed of excursion cars, and not finding any seat stood on the platform, no objection being made to his doing so. While the train was going around a curve at a high rate of speed he was thrown off into the air and killed. There was no proof whether or not he was holding on to anything at the time. *Held*, That the jury was warranted in finding defendant guilty of negligence, and that nothing was proved from which as a question of law the court could attribute contributory negligence to deceased.

The sale of seats by a company for a certain train binds it to furnish a safe and secure place for its passengers to ride and comfortable accommodations for their convenience.

This action was brought to recover damages for the death of W., plaintiff's intestate, alleged to have been caused by defendant's negligence. Defendant owns and operates a railroad running from Greenpoint to Coney Island by way of East New York.

Its passenger cars are of a well-known style for excursion railways, having seats running across, with open sides for the ingress and egress of passengers. There is evidence tending to show that W. got on a train at a way station; that he looked for seats before getting on, and not being able to find any took a position, with his companion and others, on the platform of a car. Other passengers were also riding upon the platforms of other cars, and many were standing up inside the cars between the seats. No servant of defendant pointed out any seat for him to occupy, or objected to the position he had taken on the car. There was also

evidence tending to show that the accident occurred in consequence of a sudden lurch given to the car by the great and increased speed with which it struck and turned a curve. Some of the witnesses described this motion as of considerable violence, and one of them swore that he would have been thrown to the floor if he had not caught and been sustained with both hands by the seats. Another testified that the motion of the car sent W. flying through the air, and another that it threw him off up into the air. The evidence was conflicting as to whether W. was standing near the center or near the edge of the platform at the time of the accident, and there was no proof as to whether he was holding on to anything or not at the time. A verdict was rendered for the plaintiff.

*Alfred C. Chapin*, for applt.

*Wm. N. Cohen*, for resp't.

*Held*, No error; that the evidence warranted the jury in finding defendant guilty of negligence; that simply questions of fact were presented, and there was nothing proved for which the court could, as a question of law, attribute contributory negligence to the deceased. 67 N. Y., 596.

The stoppage of the train at one of its regular stations constituted an invitation to the public to take passage thereon. The sale of seats by defendant at that station for passage on that train bound it to furnish a safe and secure place for its passengers to ride, and comfortable accommodations for their convenience.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

*Per curiam* opinion. All concur.

### GUARANTY.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The D., L. & W. RR. Co., v. John M. Benkhard et al.

Decided April, 1885.

A guaranty of payment of A.'s indebtedness to plaintiff is released by acceptance by plaintiff of notes in renewal of paper originally given for such indebtedness in accordance with the terms of guaranty.

Motion by plaintiff for new trial on exceptions taken at Circuit, ordered heard at General Term in first instance.

Action on the following instrument made by defendants, "For a valuable consideration to us in hand paid by the Delaware, Lackawanna & Western Railroad Company at and before the execution hereof, the receipt of which is hereby acknowledged, we do hereby agree to and with the said company that Frank J. Florack, of the City of Rochester, State of New York, who has purchased, or is about to purchase, anthracite coal of said company, shall and will pay said company, at such time or times and at such prices as may be agreed upon between the said company and the said Frank J. Florack, for all coal that may be shipped to him up to the first day of May, A. D. 1882, and in default of his so doing we agree to pay for the same, whether the indebtedness be in open account or embraced in notes,

drafts or bills of exchange. Witness our hands and seals the ninth day of June, 1881. John M. Benkhard, George Fritchie, Katharine Fritchie," duly sealed. Before this agreement and afterward, but only till Nov. 5, 1881, plaintiff shipped Florack coal worth some \$15,000, upon which he made some payments. On October 20, 1881, Florack gave plaintiff his note, at three months, for \$2,500, and at its maturity paid \$838.75 and gave a new note, at three months, for the balance. On Nov. 21, 1881, he gave plaintiff his note, at three months, for \$2,596.58, and at its maturity paid \$1,040.82 and gave a new note, at one month, for the balance, on the maturity of which he made a payment and gave a new note, at one month, for the balance, on which he subsequently made a payment. This action is for the balances due on the two unpaid renewal notes. Plaintiff was nonsuited as to Katharine Fritchie because she was a married woman; and verdict was directed for the other defendants.

*W. P. Goodelle*, for plff.

*Sullivan & Morris*, for deft. Benkhard.

*Satterlee & Yeoman*, for defts. Fritchie.

*Held*, That the married woman was not bound. Defendants were sureties, and their liability rested wholly in the agreement to answer for their principal's default. The intention of the parties must be derived from the language of the writing rightly interpreted. 62 Barb., 351; 83 N. Y., 338; 73 id., 339. The contract is *strictissimi*

*juris*, and the rights of the parties must depend upon the terms which the guarantor has prescribed by it. 2 Cai. Cas., 57; 61 N. Y., 89; 81 id., 406; 5 Bing., 54. The same rules of interpretation apply here as in other contracts. 13 N. Y., 232; 7 Peters, 113; 93 N. Y., 273.

The contract is a continuing one and relates without restriction to all sales during the time prescribed. 24 Hun, 387. The parties contemplated that the sales should be on such credit as plaintiff and Florack should agree on. The time fixed by the agreement of purchase in which the coal was to be paid for expired when the notes first given became due, and giving the new notes created a new element in the arrangement for credit, after the credit within the contract had expired. 25 N. Y., 479. The expression "at such time or times" does not import that succeeding terms of credit may be given. The remark of plaintiff that it would be as lenient as possible toward Florack cannot be construed as an arrangement including extension of credit by renewal paper. The renewal notes suspended until their maturity all remedy by plaintiff or defendants against the maker on account of the debt secured thereby. 38 N. Y., 96; 70 id., 551. Defendants' liability ceased when those notes were taken. 3 Mer., 272. See 8 Bing., 156; 1 Crompt., M. & R., 97; 7 Hill, 250; 23 Barb., 478; 3 Den., 512; 64 N. Y., 457; 74 id., 333.

*Nat. Bank v. Hall*, 83 N. Y., 338, distinguished.

The fact that the renewal notes

matured before May 1, 1882, is not material. 67 N. Y., 127. That defendants might have protected themselves by directing plaintiff to collect of Florack is not pertinent; and moreover, that may not have resulted in any advantage to them. 13 Johns., 174.

Florack's assignment to Benkhard to indemnify defendants against loss, made June 7, 1882, does not charge them with liability in this action, nor can it be treated as a waiver by Benkhard of any defence. 18 Barb., 290; 9 Mass., 332. But plaintiff may, in an appropriate action, have the assigned property appropriated in payment of its claim. 2 Paige, 311; 2 Sand. Ch., 166; 3 id., 428.

Motion denied and judgment ordered on verdict.

Opinion by *Bradley, J.*; *Barker* and *Corlett, JJ.*, concur.

#### BAR.

#### N. Y. COURT OF APPEALS.

*Pray et al., ex'rs, appls., v. Hegman, ex'r, et al., respts.*

Decided March 3, 1885.

By the will of one M. a trust was created for the life of his son, the income during his minority to be added to the principal and the income of the whole fund to be thereafter paid to him. In an action by the son to have the trust declared void and the fund paid over to him, judgment was rendered declaring the trust valid. *Held*, That said judgment was a bar to an action by creditors of the son to recover the accumulations of income; that the estoppel was available to the son of the beneficiary although he was not *in esse* when it was rendered. and that the executor of M. could not waive the estoppel to the prejudice of the persons beneficially interested and claiming it.

This action was brought to recover the accumulation of income of the share of an estate held in trust under the will of M., by a judgment creditor of the *cestui que trust*. M. directed, in his will, that one-third of his residuary estate should be held in trust for his son A. during his life, the income during A.'s minority to be added to the principal, and upon A. arriving at the age of twenty-one the income of the accumulated fund should be thereafter paid to him, the fund at his death to go to his issue, and in case he died without issue, to certain beneficiaries named. An action was brought by A. against the executor and the parties interested to have the trust declared void in its creation, and that as heir-at-law and next of kin of M. he be declared owner of the fund, and that the securities in which it was invested be transferred to him. The defendants in their answers set up that the trust was valid. A judgment was rendered declaring the trust valid. This action was subsequently brought.

*Josiah T. Marean* and *Joseph M. Pray*, for appls.

*B. F. Tracy*, for respts.

*Held*, That the judgment in the former action was a bar to the present one, as the relief sought here was within the scope of the former action and might have been granted therein, and that the same is binding upon this plaintiff. 2 N. Y., 275; 15 id., 51; 27 id., 596.

*Also held*, That the estoppel in the former judgment was available to the son of A. and his representa-

tives, although he was not *in esse* when it was rendered, on the principle that his title, which subsequently accrued, was represented by the other defendants who were then presumptively entitled to it. Story's Eq. Plead., § 144; 80 N. Y., 320.

Upon the trial the executor of M. formally waived the benefit of of the estoppel.

*Held*, That he could not do this to the prejudice of the persons beneficially interested, who were before the court insisting upon it.

The estoppel of a former judgment extends to every material matter within the issues, which were expressly litigated and determined, and also to those matters which, though not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. 3 N. Y., 522; 77 id., 76.

It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is for the purpose of the estoppel deemed to have been actually decided. 41 N. Y., 113; 75 id., 150; 31 Barb., 534. Subordinate rights or questions which are branches of a larger right or question put in issue, and which under the pleadings may be decided, and as to which relief may be given in the action, although the principal or main relief is denied, are determined by a judgment on the merits denying all relief.

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Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Andrews, J.* All concur.

#### TOWNS. PARTIES. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Isaac Mitchell, sup'r, *respt.*, v. George H. Strough et al., *appls.*

Decided Jan., 1885.

An action against the railroad commissioners of a town and others for alleged wrongful conduct in issuing town bonds, by reason whereof the town rights and property may be injuriously affected, may be maintained in the name of the supervisor.

The bonds were issued by the commissioners in 1872, and delivered to the railroad while the adjudication of the county judge was in force. This action was brought in 1879. *Held*, That the cause of action was barred by the statute of limitations.

Appeal from judgment of \$110,800 in favor of plaintiff, entered on verdict, and from order refusing new trial on the minutes.

Action on the case against the railroad commissioners of the town of Orleans, the Clayton & Theresa R.R. Co., the Utica & B. R. R.R. Co. and others, for wrongful and fraudulent conduct in the issuing and disposition of town bonds of the town, thus exposing its rights and property to be injured by reason of the creation of a liability which has ripened into an indebtedness of the town, by means of which its credit, its property and rights may be injuriously affected. It is claimed that plaintiff, as super-

visor, cannot maintain, and that the action should have been brought in the name of the town.

*F. Kernan, H. E. Morse and W. F. Ford, for applts.*

*J. Lansing and Levi H. Brown, for respt.*

*Held, Untenable.* As the action is for an injury to the property and rights of the town of Orleans, the supervisor was authorized to maintain the action in the name of the town. 56 N. Y., 504; *id.*, 663; 62 *id.*, 434; 27 Hun, 175; 92 N. Y., 577; 85 *id.*, 111. The latter case seems to be put upon the ground that a liability existed in favor of the town, and therefore the supervisor might maintain the action. See also *Town of Kendall v. Holmes*, opinion by Barker, J.

*Hagadorn v. Raux*, 72 N. Y., 584, distinguished.

If we are right in supposing that the supervisor was authorized by law to bring an action like the one before us, then no resolution of the town was necessary. 1 Den., 510; 3 T. & C., 431.

Proceedings to bond the town in favor of the C. & T. RR. Co. were begun and an adjudication rendered by the county judge in July, 1871. On April 2, 1872, the commissioners subscribed for stock in the railroad, and on April 3 and 4, 1872, delivered the bonds and received scrip therefor in the sum of \$80,000. The adjudication was affirmed by the General Term in June, 1872, but was reversed by the Court of Appeals in 1873 for an erroneous ruling in rejecting withdrawals of consents down to and upon the hearing. This action

was brought May 31, 1879. The court refused a nonsuit as to the commissioners.

*Held, Error.* When they issued the bonds the adjudication was in force, and they were apparently clothed with power and right to subscribe for stock in the C. & T. RR. Co. and to issue bonds in payment in behalf of the town. In April, 1872, the commissioners had parted with all control over the bonds; they had received the stock in behalf of the town, and the evidence fails to establish any fraudulent acts or practices by the commissioners as to the bonds committed or suffered by them. When the bonds were delivered to the C. & T. RR. Co. they were beyond the control of the commissioners, and at no time after that was it in the power of the commissioners to recall or cancel the bonds. The duty they were charged with by the statute in respect to the issue of the bonds was complete. As this action was not brought within six years after the last act of the commissioners, the six years' statute of limitations is a bar to the action. 33 Hun, 250. See 57 N. Y., 351; 6 Cow., 238; 1 Sandf., 98, and cases cited. We think the jury had no evidence before them from which they were warranted in finding any tortious or wrongful act on the part of the commissioners subsequent to the delivery of the bonds in April, 1872.

*Also held,* That the evidence fails to establish that the C. & T. RR. Co. or its officers, when the bonds were received, were engaged in any intentional and actual fraud up-

on the town. On the contrary, it was then adjudicated that the commissioners had power to issue the bonds. As long as such power existed the railroad company and its officers had the right to receive the bonds in payment for stock. No stay of proceedings had been obtained to prevent the issuing of the bonds. If the town, or those acting in its behalf, had sought to prevent a delivery or sale of the bonds, a stay should have been obtained. 2 Hill, 160; 99 U. S., 682. But it is insisted that the reception of the bonds was wrongful and fraudulent. We think it more in harmony with the status of the parties at the time to infer that the commissioners supposed, as the adjudication of the county judge stood unreversed, that they had the power to issue the bonds, and that the railroad company and its officers had the right to receive them in payment for scrip or stock of the road. While it was undergoing review the adjudication of the county judge was protective, and though it was finally reversed it served as a justification for the commissioners who acted upon its validity. 3 Wend., 43; 29 N. Y., 106.

Prior to the decision in the Court of Appeals, the C. & T. RR. Co. entered into an arrangement with the U. & B. RR. Co. for the completion of the building of the former road, and to induce the latter to purchase and advance iron for the road-bed it agreed to turn over these bonds. This agreement was carried out, and in Feb., 1874, in pursuance of authority from the

C. & T. RR. Co., defendant M. sold these bonds to one P., a resident of Chicago, and delivered the proceeds to the U. & B. RR. Co. M. testified that he sold the bonds to P. without giving him any notice of any litigation therefor; that he "considered these bonds were valid in the U. S. courts," and that one reason of taking them into another state and selling them was that they "could be enforced in the U. S. court."

*Held*, That when the decision in the Court of Appeals was made the U. & B. RR. Co. was equitably the owner of the bonds. From the facts it must be assumed that whatever rights the C. & T. RR. Co. had in the bonds they acquired while the adjudication was in force and delivered stock for the bonds. Such rights thus acquired could be pledged to the U. & B. RR. Co. without any conversion of the bonds, and without the violation of any agreement that they should not thus be used.

*Comstock v. Hier*, 73 N. Y., 269, distinguished.

The court refused to charge "that neither M., B. nor B. was liable if the jury found that he believed that the bonds were valid as against the town in the hands of the C. & T. RR. Co. to be used in construction of the road of that company and acted honestly in what he did in disposing of the bonds for that purpose," and also refused to charge that if M. acted in the belief that he had a right to transfer the bonds to a party residing out of the state, he was not liable. The court, on request,

charged that neither of defendants was liable unless the jury found that he acted fraudulently and in bad faith in what he did in reference to the bonds.

*Held*, That the jury was not put in full possession of the principles of law which should control in dealing with the questions of fact involved in the issues, and have not properly passed upon them.

*Also held*, That it was error to admit the declarations of G. as against the other defendants. What he said was not evidence against the others unless there was a conspiracy established so that his words would bind the others, and that his statement that the bonds were sold in Canada at par and got the gold for them, was inadmissible.

Judgment and order reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, J.J.*, concur.

#### EVIDENCE. CHARGE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Augustus De Bost, *respt.*, v. Albert Palmer Co., *applt.*

Decided March 4, 1885.

All persons dealing with the president of a corporation in the name of the corporation are bound to take notice of the nature and extent of his authority when he assumes to act as such president in making any contract; and the by-laws of the corporation are competent evidence for the purpose of showing the extent of his authority without proof of notice of such by-laws to the other party.

Counsel handed up to the court numerous written requests to charge. After the

charge counsel said: "I desire to call your honor's attention to certain propositions embodied in the written requests to charge which I have submitted to —." At this point the court interfered, saying: "I decline to charge further than I have already," and an exception was taken. *Held*, Error.

Appeal from judgment entered on verdict, and from order denying motion for new trial.

This action was brought to recover commissions which, it was alleged, defendant had agreed to pay plaintiff for procuring the sale of certain lands. The agreement to pay such commissions was in writing, and was signed, on behalf of defendant, by A. W. Palmer, President, (L. s.)" Upon the trial the original by-laws of defendant were offered in evidence for the purpose of proving that the president had no authority to bind the corporation by his signature to said agreement. Plaintiff's counsel objected to the admission of the by-laws upon the ground that, inasmuch as defendant's counsel stated that he did not propose to show notice to plaintiff, the proof was immaterial, irrelevant and not evidence against plaintiff. The objection was sustained, and the evidence excluded, and defendant excepted.

*Dill & Chandler*, for applt.

*George A. Strong*, for respt.

*Held*, That defendant clearly had a right to show that the contract was not authorized by the corporation, and not so executed as to bind the corporation. That the president of the company was an agent having a special power and authority declared and defined by the by-



laws of the corporation. That all persons dealing with him in the name of the corporation were bound to take notice of the nature and extent of his authority when he assumed to act as president of the corporation in making any contract, and it was certainly competent to put the by-laws of the corporation in evidence for the purpose of showing the extent of his authority. 52 Barb., 399; 10 Abb., N. S., 39; 1 Hun, 202; 83 N. Y., 480.

At the close of the testimony the counsel for defendant submitted to the court a large number of requests to charge in writing. In charging the jury the court did not embody all these requests, and defendant's counsel, after taking some exceptions to the charge, said: "I desire to call your honor's attention to certain propositions embodied in the written requests to charge, which I have submitted to —" At this point the court interfered, saying: "I decline to charge further than I have already," and defendant excepted.

*Held, Error.* That the counsel was attempting to call attention to certain propositions embodied in the requests to charge. That he was not asking to charge the whole as a body, and he was entitled to distinguish and point out the specific propositions he desired to have charged for the purpose of procuring a charge thereon, or availing himself of a distinct exception if it were refused. That the court prevented him from doing this, and thus deprived him of a legal right. 86 N. Y., 479.

Judgment reversed and new trial ordered.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

### CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John P. Hollingshead, *applt.*, v. William Woodward, *respt.*

Decided March 4, 1885.

When a certificate of a certain number of shares of the stock of a corporation has been issued to a stockholder thereof as a stock dividend, when in fact no such dividend has been earned, and the board of directors subsequently rescind their resolution declaring such stock dividend, such rescission annuls the previous action of the board and cancels the certificates which have been issued, and the stockholders cannot be held to any liability, as such, upon or by virtue of the alleged shares so issued to them and afterward annulled, for any claim against the corporation accruing after such rescission.

A judgment sequestrating the property of a corporation and appointing a receiver thereof and enjoining the corporation from the exercise of its corporate franchises does not operate to dissolve the corporation, and the stockholders are not relieved from their personal liability, as such, at the end of two years from the taking effect of such judgment upon the ground that they have ceased to be stockholders for that length of time. A corporation cannot be dissolved except by the judgment of a court of competent jurisdiction dissolving it.

Appeal from judgment of the Special Term.

This was an action brought by a creditor of an insolvent manufacturing corporation to enforce the individual liability of one of the stockholders on account of the failure of other stockholders to pay up all the capital.

One defence set up by the answer was that twenty-five of the shares alleged to be owned by defendant were issued to him as a stock dividend, when in fact no such dividend had been earned, and that the board of directors had subsequently rescinded their resolution declaring such stock dividend before the claim sued upon accrued, and that thereby the certificate of such twenty-five shares was annulled.

Another defence was that more than four years prior to the commencement of this action a judgment had been rendered by the Supreme Court of N. Y. against the corporation, whereby all the stock, property and effects of the company were sequestered for distribution among its creditors, and a receiver appointed thereof and vested with their exclusive control, and the officers, etc., of the company were enjoined from interference therewith, and that since said date the company had not transacted any business, and that its property and effects had been distributed by the receiver among its creditors; that there was no surplus for the stockholders, and that the corporation was therefore dissolved, and the defendant had ceased to be a stockholder thereof from the date of the judgment, and that any claim against him as such was barred by the statute, which declares that the personal liability of stockholders should cease at the end of two years after they cease to be stockholders.

Plaintiff demurred to these two defences, on the ground that neither of them stated facts sufficient

to constitute a defence to the action.

*T. S. Moore*, for applt.

*J. C. Bostelman*, for resp't.

*Held*, That the first defence was good so far as it related to the twenty-five shares issued as a stock dividend. That the act of rescission operated to annul the previous illegal action of the board and to cancel the certificates which had been issued, and that defendant could not be held to any liability upon or by virtue of the alleged twenty-five shares thus issued to him and afterward annulled.

That, as to the second defence, such a judgment as was set forth therein does not operate to dissolve the corporation. That it cannot be dissolved except by the judgment of a court of competent jurisdiction dissolving it, and that upon this defence the judgment should have been in favor of plaintiff.

That there was some question whether, under the form of demurrer interposed, defendant was not entitled to the judgment rendered because one of his defences was sustained, and it could not, therefore, be said that "*neither* constituted a defence to the action," but that, under the present system of construction of pleadings, it would be too technical to affirm the judgment on that ground.

Judgment reversed as to one defence and affirmed as to the other, without costs.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs. *Brady, J.*, dissents, upon the ground that one of the defences having been sustained the judgment should have been affirmed in toto.

LANDLORD AND TENANT.  
NEGLIGENCE.

N. Y. COURT OF APPEALS.

Edwards, *applt.*, v. The N. Y.,  
& H. RR. Co., *respt.*

Decided March 3, 1885.

Where the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence he is not liable for any injury suffered by any person occupying or going upon the premises during the term of the lease.

Negligence on the part of a landlord is not to be inferred simply from the fact that the structure which he lets breaks down; it must be shown he had reason to know that it was dangerously weak and imperfect.

Affirming S. C., 13 W. Dig., 407.

This action was brought to recover damages for injuries sustained by plaintiff through the falling of a gallery in a building known as Gilmore's Garden, in the City of New York. It appeared that the building was designed for public entertainments and was leased by defendant to one K. to be used for a pedestrian exhibition, the lessee agreeing to make any and all such changes in the interior of the building, in its appointment and fixtures, as he might see fit at his own expense, on condition that he should surrender the premises at the end of the term in the same state they were in at the beginning. There was no agreement on the part of the landlord to make any changes or repairs. The building contained a gallery, which had been built under the supervision of an architect. It was divided into boxes, capable of holding from four to six persons, and each box

was supplied with a table and chairs. They were intended for occupation by persons who could be served with refreshments while witnessing the performances on the main floor. This gallery was suitable for the purposes for which it was built, the accommodation of a limited number of persons, and had been so used on several occasions, a higher price being charged for admission to the gallery than to other parts of the house. Defendant removed the tables and chairs from the gallery and made the price of admission to it the same as to other parts of the house. During the pedestrian exhibition the gallery was crowded with boisterous people who stamped, keeping time with the music, and it fell, injuring plaintiff, who was under it. There was no proof that defendant had reason to believe that there was any defect in the gallery, or that it was not sufficiently strong to hold the people it could accommodate, or that it would be so used as to endanger its security. The plaintiff was nonsuited.

*Samuel D. Morris*, for *applt.*

*Frank Loomis*, for *respt.*

*Held*, No error; that the evidence failed to disclose negligence on the part of defendant that would render him liable in this action.

*Swords v. Edgar*, 59 N. Y., 28; *Camp v. Wood*, 76 N. Y., 92; *Francis v. Cockrell*, L. R., 5 Q. B., 501; *Groat v. C. & H. R. Co.*, 2 Exch., 251, distinguished.

Upon the demise of real estate there is no implied warranty that the property is fit for occupation,

or suitable for the use or purpose for which it is hired. The only implied warranty in such case is one for quiet enjoyment. 56 N. Y., 398; 26 Penn. St., 111; L. R. 5 Q. B., 501; Thompson on Negligence, 323.

If a landlord lets premises and agrees to keep them in repair and fails to do so, in consequence of which any one lawfully on the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing they are dangerous and unfit for the use for which they are hired and fails to disclose their condition he is guilty of negligence for which he may be held responsible. But, where the landlord has created no nuisance and is guilty of no willful wrong or fraud or culpable negligence he is not liable for any injury suffered by any person occupying or going upon the premises during the term of the lease. This is so whether the property demised consists of a dwelling house or of buildings to be used for public purposes.

Negligence on the part of a landlord is not to be inferred simply from the fact that the structure which he lets breaks down; it must be shown he had reason to know that the structure was dangerously weak and imperfect. 20 Penn. St., 387; 70 id., 460; 15 C. B., N. S., 221; 126 Mass., 545; L. R. 2 C. P. D., 311.

Judgment of General Term, affirming judgment non-suiting plaintiff, affirmed.

Opinion by *Earl J.*; *Rapallo*, *Andrews* and *Miller, JJ.*, concur.

*Ruger, Ch. J.*, reads dissenting opinion. *Danforth*, and *Finch, JJ.*, concur.

## EMINENT DOMAIN.

### N. Y. COURT OF APPEALS.

*In re* petition of the N. Y., L. & W. RR. Co., *applt.*, for appointment of commissioners to appraise lands of Bennett et al., *respts.*

Decided March 10, 1885.

Where the parties have made a contract of bargain and sale, leaving the question of consideration to be decided by certain commissioners named who are to proceed under the statute, and the right to appeal from their decision is reserved, the court may refuse to appoint the commissioners, but if it appoints them the court is bound, as between the parties, to enforce and carry out the agreement, and cannot, on setting aside their award, appoint new commissioners.

Affirming S. C., 20 W. Dig., 212.

On May 24, 1883, the respondents entered into an agreement with the appellant for the sale of certain real estate owned by them. The appellant agreed with diligence to take proceedings as provided by Chapter 140, Laws of 1850, as amended, for the purpose of ascertaining the compensation the respondents should be paid for the property and of obtaining title in fee thereto. It was agreed that in the proceedings H., D. and C. should be appointed appraisers to ascertain and determine the compensation to be paid, and in doing so they should be governed by the rules applicable to proceedings under the statute, except as they were modified by the agreement, and that the rights of appeal given by law should be reserved to either

party. It was further agreed that in the proceedings no damages should be allowed because of injury to certain property mentioned or to any other adjoining premises or property, or for any thing except the actual value of the premises and property purchased; that in ascertaining and determining the compensation to be allowed the commissioners should take into consideration the capability of the premises for any use whatever; that they should determine such compensation without delay, and upon their own knowledge and information as well as such evidence as might be produced before them; that the value finally arrived at in the proceedings should be the fixed purchase price to be paid by the appellant; that \$20,000 should be advanced towards the purchase price within ten days after the execution of the agreement; that the balance as fixed in the proceedings should be paid within six months of the date of the contract. The agreement contained various other stipulations and provisions. In pursuance of the agreement the appellant presented a petition under the act of 1850, and procured the appointment of the persons named as commissioners. A hearing was had and they made their appraisal and award and reported the same to the Supreme Court. The appellant, being dissatisfied, appealed to the General Term, which reversed the award and ordered a new appraisal before the same commissioners, but refused to appoint new commissioners on the ground that it did not have the power to

do so because the parties had by their contract agreed upon their commissioners. The company appealed from that part of the order refusing to appoint new commissioners.

*John G. Milburn*, for applt.

*Geo. F. Comstock*, for respts.

*Held*, That the Special Term could have refused to appoint the commissioners named and have left the parties either to have abandoned their agreement or to carry it out in some other way, but having appointed the commissioners named the parties were bound by their agreement, and the court was bound as between the parties to observe, enforce and carry out the agreement.

Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights. Such stipulations not unreasonable or against good morals or sound public policy will be enforced, and generally all stipulations made by parties for the government of their conduct or the control of their rights, as in the trial of a cause or in the conduct of a litigation, are enforced by the courts. 3 N. Y., 197, 511; 38 id., 266, 312; 44 id., 415; 45 id., 102; 61 id., 594; 63 id., 176; 72 id., 499; 74 id., 382; 86 id., 339; 89 id., 315; 93 id., 507, 589.

Order of General Term, affirming order refusing to appoint new commissioners, affirmed.

Opinion by *Earl, J.* All concur.

**FORECLOSURE SALE. MER-  
GER. ADMINISTRATOR.**

**N. Y. COURT OF APPEALS.**

Abbott, pub. adm'r., *respt.*, v.  
Curran et al. Lowell, purchaser,  
*applt.*

Decided March 24, 1885.

An objection that the property sold on foreclosure was not sufficiently described in the mortgage is not tenable when it appears that the premises could be definitely located by any competent person going upon the ground with the description.

The summons was addressed to the heirs at law, etc., and their wives or husbands, if any. *Held*, that the words "if any" as used would not invalidate a summons otherwise perfect.

The mortgagor conveyed the premises to the mortgagee, the deed expressly declaring that it should not operate to merge the mortgage, but only to grant the equity of redemption. *Held*, that the intention that the deed should not operate as a merger should have effect.

A referee to sell was appointed by consent of all the parties who had appeared, who were all the parties but one, who was an absentee. *Held*, that if this was an error under Chap. 439, Laws of 1876, it did not render the appointment illegal or the sale void.

Letters of administration are conclusive evidence of the administrator's authority until revoked.

A recital in a deed that it was made "for commercial purposes only" imposes no restriction on the absolute title.

*Affirming S. C., 20 W. Dig., 844.*

This was an appeal from an order of the General Term, affirming an order directing L., the appellant, to complete purchase of land struck off to him at a sale under judgment of foreclosure herein.

It was objected that the premises were not sufficiently described in the mortgage foreclosed.

It appeared that the premises could be definitely located by any competent person going upon the ground with the description.

*Sidney V. Lowell*, *applt.*, in person.

*H. B. Hathaway*, for *respt.*

*Held*, That the objection was not tenable.

It was also objected that the summons was defective because addressed to unknown owners who were described "as the wife, widow, heirs-at-law, devisees, grantees, assignees or next of kin (if any) of said Michael Curran, and their respective wives and husbands (if any)."

*Held*, That the words "if any" are not objectionable, and as used would not invalidate a summons otherwise perfect. Code, §§ 438, 451.

It was also objected that the mortgage could not be foreclosed because it had become merged in the legal title. It appeared that the mortgagor never paid the mortgage, but after it had been given conveyed the mortgaged premises to the mortgagee, the deed expressly declaring that it should not operate to merge the mortgage, but only to convey to the mortgagee the equity of redemption in the premises.

*Held*, That as it was the intention of the parties that the deed should not operate as a merger, such intention should have effect. 10 N. Y., 202.

The defence of merger was not set up. A regular judgment of foreclosure was entered.

*Held*, That no one can claim

against a purchaser under the judgment that there was a merger of the mortgage which would prevent its foreclosure.

Chap. 439, Laws of 1876, provides that foreclosure sales in Kings County, where these premises were situated, shall be made by the sheriff unless all the parties to the action consent that they be made by a referee. In this case the parties who appeared in the action consented that the sale should be made by a referee and such a sale was ordered by the judgment in which the referee was named. All the parties appeared except one, who was an absentee.

*Held*, That if the court erred in holding that the statute had been complied with, its error did not render the appointment of the referee illegal or the sale by him void. It was at most an error which could be corrected by any party to the record by application to the court, or by appeal from the judgment.

It was objected that the plaintiff was not properly appointed administrator.

*Held*, That if there was any irregularity in his appointment his letters were conclusive evidence of his authority until revoked. Code, § 2591.

Where an administrator has prosecuted an action to judgment after proper service of summons on all the defendants, the judgment and a sale under it cannot be assailed by any of them because of any irregularity or even want of jurisdiction in granting the letters of administration.

It appeared that the mortgaged

premises were granted by the State; that the grant recited that it was made for commercial purposes only and for the benefit of commerce.

*Held*, That this language in the grant did not impose a condition precedent or subsequent, or any restriction upon the absolute title. 11 N. Y., 315; 52 id., 635; 74 id., 196.

Order of General Term, affirming order requiring purchaser to complete purchase, affirmed.

Opinion by *Earl, J.* All concur.

#### APPRENTICES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Joseph Barton, *applt.*, v. Patrick Ford, *respt.*

Decided Jan., 1885.

One McS., a minor, was apprenticed to plaintiff, but during the term left without plaintiff's consent and worked for defendant. The contract of apprenticeship contained the first and third covenants provided for in § 2 of Chap. 934, Laws of 1871. In an action to recover for the minor's services, *Held*, That plaintiff was not entitled to recover; that to do so he must show the existence of a valid contract of apprenticeship, and that the contract shown was invalid.

Appeal from judgment of County Court, affirming judgment of nonsuit in Justice's Court.

Action to recover for work and labor performed for defendant by one McS., a minor.

On Sept. 13, 1880, McS., his father and plaintiff executed under their hands and seals a contract by which the minor was apprenticed to plaintiff for four years "to learn the trade, craft and business

of cigar-making." The mother of the minor on the same day consented to the contract by a certificate endorsed thereon and executed under her hand and seal. The contract contained the first and third provisions specified in § 2 of Chap. 934, Laws of 1871. The minor immediately entered into the service of plaintiff, and continued therein until April, 1881, when he left without plaintiff's consent, and in June and July thereafter was employed by defendant for about thirty days. Plaintiff sued to recover for these services, and was non-suited.

*Fuller & Kellogg*, for applt.

*Jenney, Brooks, Marshall & Ruger*, for respt.

*Held*, No error. To recover in this action against a person not a party to the contract of apprenticeship plaintiff must establish the existence of a valid contract of apprenticeship. 4 Taunt., 876; 18 Conn., 337. As against a wrongdoer an apprenticeship *de facto* is sufficient to entitle a master to recover, but this is not an action for damages for enticing away a servant or employee. The existence of a legal right in plaintiff to the services of the minor and to control his conduct lies at the foundation of the action. The master must, so far as the right of service is concerned, stand in the place of the parent.

Section 6 of Chap. 934, Laws of 1871, provides: "Any indentures made and executed wherein parts conflict with or are not in accordance with the provisions of this act shall be invalid and without

any binding effect." Section 2 of this act provides: "Said agreement or indenture, in order to make the law (contract) valid, shall contain the following covenants and provisions." Three provisions are then enumerated in the section. The first and third provisions of the section are contained in the contract of apprenticeship, but not the second, which renders the contract invalid by the express terms of the statute.

Whether the assent of the mother endorsed upon the contract executed by the father is a sufficient compliance with the first section of the act, which requires that the agreement shall be executed by the parents of the minor, if living, *quære*.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### GENERAL ASSIGNMENT. ACKNOWLEDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Horace B. Claflin et al., *respts.*,  
v. Clinton H. Smith, *applt.*

Decided March 4, 1885.

The certificate of acknowledgment of a general assignment which was written immediately after the clauses of acceptance of the trust, and of attestation and the signatures and seals of the parties was as follows:—"State of N. Y., City & Co. of N. Y., ss: On this 21st day of Feb., 1882, before me personally appeared C. H. S. and J. G. S. of the City of N. Y., to me personally known to be the individuals described in and who executed the same and who acknowledged to me that they executed the same for the purposes there-



in mentioned " *Held*, That while the certificate was defective in form it was not vitally so, and that the assignment was properly recorded.

In action to set aside the assignment upon the ground that the above certificate of acknowledgment was defective the officer who took such acknowledgment was called to prove that in fact the requirements of the statute in respect of the act of acknowledgment had been complied with. This evidence was excluded. *Held*, Error.

Appeal from judgment of Special Term, setting aside a general assignment.

The ground upon which the assignment was claimed to be invalid was that the certificate of acknowledgment of its execution was defective. This certificate was written immediately after the clauses of acceptance of the trust, and of attestation and the signatures and seals of the parties, and was in the following form: "State of N. Y., City & Co. of N. Y., ss: On this 21st day of Feb., 1882, before me personally appeared J. H. S. and J. G. S. of the City of N. Y., to me personally known to be the individuals described in and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned.——Commissioner of Deeds." On the trial the Commissioner of Deeds who took the acknowledgment was called as a witness, and the fact that an acknowledgment was made in due form at the time stated in the certificate was offered to be proved. This evidence was excluded and an exception taken.

*R. L. Fowler, J. J. Adams and W. F. Dunning*, for applt.

*Otto Horwitz and Daniel C. Briggs*, for respts.

*Held*, Error. That the appellants had the right to show that, in point of fact, they had complied with the requirements of the statute in respect of the act of acknowledgment although the certificate was in form defective. That this would have eliminated from the case all questions of intent not to comply with any requirement of the statute and left to the court to determine the naked question of the effect of the mere accidental omission of a public officer to fully certify what was in fact done.

That if the certificate of the officer were so absolutely defective that the court could not construe it as signifying, though elliptical in form, substantially what the law requires, the parties must bear the consequences; but that such official acts must be read if possible in such way as to make them effective to preserve the rights of the parties, and reading this certificate in the light of this rule, and taking into consideration its direct contact with the assignment itself, it appeared that the phrase "personally known to be the individuals described in" plainly referred to the body of the instrument for the description of the persons who personally appeared before and were personally known to the commissioner; and the following words: "and who executed the same, and who acknowledged to me that they executed the same for the purposes therein mentioned" could have no significance except one, which was made explicit and clear by refer-

ence to the assignment preceding the certificate, as was the manifest intent of the language used, and that the words "the same" were to be read as though the words were "this instrument" in the first place in which they appear.

That the general assignment act, Chap. 466, Laws of 1877, looks only to the substance of the thing and is satisfied when the act appears in that respect to have been complied with, and that, as no form of certificate is therein prescribed, it need not be in any particular form. 58 N. Y., 627; 42 Barb., 284; 45 N. Y., 703; 95 U. S., 713; 21 Miss., 373; 24 Minn., 161; 35 Iowa, 60; 27 Ind., 478; 5 Smedes & H., 470; 48 Mo., 444; 14 Pa., 364; 96 N. Y., 253.

Judgment reversed, and judgment entered dismissing the complaint.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Edward W. Edwards, *applt.*, v. Henry O. Nichols, *respt.*

Decided Feb., 1885.

In an action to recover damages for alienation of the affections of plaintiff's wife, the complaint alleging that plaintiff and his wife were living happily together, evidence tending to show that they did not live happily together, that the wife had no affection for plaintiff, and that he lost nothing by deprivation of her society is admissible under a general denial.

Appeal from judgment in favor of plaintiff for \$50, and from order

denying motion for new trial on the minutes.

Action to recover \$25,000 damages for the alleged alienation of the affections of plaintiff's wife. The complaint alleged that while plaintiff and his wife "were living together happily as man and wife" defendant alienated her affections, stating details of time and place, and that he was harboring her and that she was living with him apart from plaintiff. The answer was a general denial. On the trial plaintiff confined himself to proof of the last charge, as to harboring his wife, and testified that he had lived happily with her.

Defendant introduced evidence tending to show cruel and inhuman treatment of his wife by plaintiff and unhappy relations existing between them. This evidence was objected to on the grounds of irrelevancy and because not pleaded. Code, § 536. The objection was overruled, the evidence admitted, and plaintiff excepted.

This appeal was taken on the ground of insufficiency of the verdict and upon the exceptions.

*Joseph A. Welch*, for applt.

*Henry Thompson*, for respt.

*Held*, No error. On the trial defendant introduced testimony that at the time he contracted relations with plaintiff's wife she had no affection for him to be estranged. The jury evidently accepted this view, and gave him a verdict for \$50. That was deemed a sufficient compensation for all he had lost, and, under all the testimony, we cannot say that the determination of the jury was erroneous.

It must be remembered that the evidence complained of was not introduced to mitigate or excuse the conduct of defendant, but only to illustrate and affect plaintiff's actual loss and injury. He had alleged in his complaint that he lived happily with his wife, and the answer put every allegation in issue. It was therefore entirely proper to receive testimony to show that plaintiff did not live happily with his wife; that she had no affection for him and that he lost nothing by deprivation of her society.

Judgment and order affirmed, with costs.

Opinion by *Dykman, J.; Barnard, P.J., and Pratt, J.*, concur.

#### BILL OF PARTICULARS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Robert Langdon et al., *appls.*,  
v. David H. Brown, *respt.*

Decided March 2, 1885.

Where defendant is not entitled to a bill of particulars as a matter of right, but on a demand by defendant plaintiffs serve one which is defective, an order that plaintiffs furnish a further bill of particulars is in the discretion of the court, and will not be interfered with where it appears that such further bill will be a facility which plaintiff should afford to defendant in preparing a bill of particulars which defendant had been ordered to give.

Appeal from order for bill of particulars.

The complaint alleged an indebtedness of defendant on a guarantee that the firm of Lowry & Brown would pay for all goods (woolens) sold and delivered by plaintiffs to said firm. The answer admitted

the indebtedness, but set up a counterclaim for damages by reason of the defective character of said goods. Plaintiffs obtained an order that defendant serve a bill of particulars of said claim for damages, specifying the number marked on each piece of damaged goods. Defendant then demanded from plaintiffs a bill of particulars of their claim. A defective bill having been served in compliance with such demand, defendant, on notice, obtained an order that a further bill be served specifying the numbers on all goods sold to Lowry & Brown; and from this last order plaintiffs appealed.

*Francis Forbes*, for *appls.*

*W. H. Sage*, for *respt.*

*Held*, That the action was not upon an account, and the complaint did not allege any account. Code Civ. Pro., § 531. Plaintiffs were not bound, therefore, by the section, to give particulars upon the mere demand of defendant's attorney. If the validity of the order depended upon whether, if the first bill served was one that could not properly be demanded, there could be a further bill ordered on the ground of defendant's absolute right to it, there might be ground for doubt. Substantially, however, after the plaintiffs had voluntarily furnished what they did furnish, it was a question for the discretion of the court whether further particulars should be given; for under the last sentence of the section specified the court may in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party. The

matter that shows that the court exercised discretion properly is that, it appearing that plaintiff had procured an order for the particulars of defendant's claim for a recoupment on account of the bad condition of some of the goods averred by the complaint to have been sold, the present order was a facility for defendant's making his bill of particulars that plaintiffs should give.

Order affirmed, with \$10 costs, and disbursements to be taxed.

Opinion by *Sedgwick, Ch.J.*; *O'Gorman, J.*, concurs.

#### SECURITY FOR COSTS. VERIFICATION.

N. Y. SUPERIOR COURT. GENERAL TERM.

Edward Ralph, *respt.*, v. Joseph Husson, *applt.*

Decided Dec. 1, 1884.

In an action in the Superior Court of New York City, plaintiff need not give security for costs as a non-resident if he reside within the State.

The mere fact that the note in suit was transferred to plaintiff by the administrators of an insolvent estate furnishes no ground for demanding from him security for costs.

The remedy for defective verification of a complaint is not by motion to compel a verification, but by treating it as a nullity.

Appeal from order denying defendant's motion to compel plaintiff to verify his complaint and to compel him to give security for costs as a non-resident.

*Dennis McMahon*, for *applt.*

*Abram Kling*, for *respt.*

*Held*, That, in so far as the motion that plaintiff be compelled to file security for costs is based upon

the claim that plaintiff does not reside in the city and county of New York, but is a resident of Kings county, it was properly denied. 46 Super. Ct., 358. And in so far as it is based on the allegation that the note in suit was transferred to plaintiff by the administrators of an insolvent estate after the maturity thereof, it was also properly denied, for that fact constitutes no ground.

Upon the other branch of the motion, viz., that plaintiff be compelled to verify his complaint, defendant has mistaken his remedy. If the verification which appears to have been annexed is really defective, as claimed, defendant may treat it as a nullity. Code, § 528.

Order affirmed, with costs.

Opinion by *Freedman, J.*; *Sedgwick, Ch.J.*, concurs.

#### HIGHWAYS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Hiram W. Lane, *respt.*, v. Josiah H. Wheeler, et al., Highway Commissioners, *appls.*

Decided April, 1885.

A bridge being out of repair, defendants barricaded it against travelers until the repairs should be made. Plaintiff's horses escaped from him, ran away, and one of them was injured by the means used to barricade the bridge. *Held*, that defendants are not chargeable for the injury.

Appeal from judgment on verdict in County Court.

Action for loss of a horse.

A highway bridge in defendants' jurisdiction needing repairs, they posted notices at either end of i

warning people of the danger, and they barricaded the bridge partly with a plank taken from it which left a hole in the floor visible to persons approaching. The barricade was completed with a rail, and was plainly indicated to the public. Defendants proceeded to procure the necessary timber and a pile-driver to make the repairs. Plaintiff's horses, hitched to a wagon, without negligence on his part, escaped from him, ran away and on to the bridge and one of them was killed, not through the defects in the bridge, but wholly through the means taken to prevent passage over it. Motion for nonsuit was denied.

*C. R. Lockwood*, for applts.

*Marvin Smith*, for respt.

*Held*, Error. The defendants are chargeable if the loss was occasioned by their negligence. 77 N. Y., 83; 96 *id.*, 283. See 40 Conn., 238, 16 Am., 33; 9 Vt., 411; 29 Wis., 296, 9 Am., 568; 64 Me., 51, 18 Am., 239; 54 Mo., 598, 14 Am., 487; 81 Penn. St., 44, 22 Am., 733; 2 Cush., 600; 4 Allen, 557; 100 Mass., 49; 73 N. Y., 368.

Delay in repairing the bridge is too remote a cause to charge defendants in this case; though it might afford a different remedy against them for failure to perform duty. 1 Hun, 570.

Defendants were not chargeable with misconduct or neglect in respect to the means used to prevent passage over the bridge. It was their duty to warn the public and to barricade the bridge. They were not bound to provide against injuries to runaway horses, or to

erect a barrier sufficient to stay their furious speed. If defendants obstructed the bridge so as to effectually advise all persons that they could not pass, and so as to prevent their passage with teams, it was sufficient. 10 Hun, 531; 15 Jones & Sp., 341; 4 Gray, 596; 80 Iowa, 438, 46 Am., 82; 16 Me., 187, 33 Am. Dec., 652.

*Regna v. Rochester*, 45 N. Y., 130, distinguished.

Another trial with attention to the question as to the means adopted to close the bridge and the manner in which it was done may develop a question of fact for the jury.

Judgment reversed, new trial granted, costs to abide event.

Opinion by *Bradley, J.*; *Haight and Childs, JJ.*, concur.

#### CONTRACT. MUNICIPAL CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Charles Schier, respt.*, v. *The City of Buffalo, applt.*

Decided April, 1885.

Plaintiff agreed with defendant to sprinkle a portion of a street. Such contract was within the powers of defendant and all the proceedings to effect it were regular on their face, and plaintiff in good faith did the work. The proceedings were in fact irregular, in that the initiatory petition was not signed by a majority of the persons taxable for the service. *Held*, that plaintiff was entitled to recover for his services.

Appeal from judgment on decision of County Court.

Action to recover for services in sprinkling one of defendant's streets.

Plaintiff presented to the common council a petition asking to have the sprinkling done and that the contract be awarded to plaintiff. The petition was referred to the assessors, who returned it certified that the petitioners were not a majority of the property owners taxable for the service. Plaintiff withdrew the petition and procured an additional name to it, and it was again presented to the common council and referred to the assessors, who returned it certified that it was signed by a majority of the taxable land owners, and the matter was referred to the committee on streets, who reported recommending that the work be ordered and that a contract be made with plaintiff and that an assessment be made to pay for it. This report was adopted by the common council, the street commissioner gave plaintiff an order to do the work, and he did it, but when he claimed his pay the common council refused it. The assessors made the assessment roll, and the common council confirmed it, but the mayor vetoed the resolution of confirmation on the ground that the petition was not signed by a majority of the property owners. The assessment was not perfected. The court determined that as plaintiff in good faith did the work and defendant received the benefit of it the latter is estopped from alleging the irregularity in the petition, and directed judgment for plaintiff.

*Giles E. Stilwell*, for applt.

*E. J. Plumley*, for respt.

*Held*, No error. The contract was not *ultra vires*, but was with-

in the powers vested in the city. Laws 1870, Ch. 519, Tit. 9, § 19; amd. Laws 1879, Ch. 486, § 2; Laws 1870, Ch. 519, Tit., 3, § 1; id., § 6, amd. Laws 1879, Ch. 486, § 1.

The petition was properly referred to the assessors, but their certificate was not conclusive; the majority is the requisite fact. But it is not in all cases where the municipal corporation would not be permitted to make an assessment because of irregularity in proceedings that a party with whom it has contracted under the same proceedings would be without remedy. 73 N. Y., 238; 83 id., 105. Plaintiff had no means of knowing that the proceedings were not regular except by examination of the maps in the assessors' office and the records in the county clerk's office. The imperfection of the assessors' maps caused the error in their certificate, and plaintiff is not prejudiced by his failure to examine the county records. He was at liberty to rely upon the accustomed methods employed. The general rule that one dealing with municipal corporations must at his peril see that the statute is complied with, 68 N. Y., 23; 77 id., 130, is not applicable here in absolute strictness. Defendant is equitably estopped from denying the regularity of the proceedings.

The contention that the petition as first presented became inoperative for any purpose, and could not be withdrawn and again used, is not well founded. The subsequent effort to give it efficiency by increase of subscribers was legitimate.

Judgment affirmed.

Opinion by *Bradley, J.; Barker*  
and *Corlett, JJ.*, concur.

# MUNICIPAL CORPORATIONS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

Frederick E. Hubbell, by guard-  
ian, *respt.*, v. The City of Yonk-  
ers, *applt.*

Decided Feb., 1885.

While negligence cannot be assigned against a municipal corporation for the design or plan of an improvement, yet where it has constructed a street upon a high embankment without guards to protect its sides it is liable for injuries occasioned by the want of such protection and cannot escape liability by the fact that the plan adopted did not call for guards.

While plaintiff was driving along such a street his horse became frightened at a bicycle, the driver lost control of him and the horse and wagon went over the embankment, thereby injuring plaintiff. *Held*, that defendant was liable, as the injury would not have occurred but for the defect in the street.

Appeal from judgment in favor of plaintiff, entered on verdict.

Action to recover for injuries alleged to have been sustained by reason of defendant's negligence. Plaintiff was riding along Linden St., in the City of Yonkers, which is built on an embankment 12 feet high, in a wagon with a friend who was driving, when the horse became frightened by an approaching bicycle. He started suddenly aside and became unmanageable.

The driver lost control of him and the horse and wagon went over the embankment and plaintiff was carried with them and received the injuries complained of. Linden street is one of the public streets of the city and was constructed ten years before in accordance with plans adopted by the Common Council of the city which specified no railing or guard along the edge of the embankment. Plaintiff claimed that the absence of such guards rendered the accident possible, or rather that the accident resulted from such absence.

Defendant now claims that the street was constructed according to a plan adopted by the Common Council, and therefore no liability can attach to the city even though the plan was defective and the injury resulted therefrom.

*Held*, Untenable. The power of municipal corporations to make improvements may or may not be exerted, and for a failure to proceed on an erroneous estimate of the requirements of the public no civil action can be maintained. The reason being that the duty imposed is judicial in its character, requiring the exercise of deliberation and judgment. But where action has been taken and judgment has been exercised and an improvement has been made, then a duty is imposed on the municipality to continue the same in order and repair, and for its violation or neglect a civil action may be sustained for damages resulting therefrom. 50 N. Y., 236; 75 id., 45; 54 id., 468; 73 id., 365. See also 96 id., 264.

While it is true that negligence

cannot be assigned against a municipal corporation for the design or plan of an improvement, the public may at the same time require care in its construction and management. The cases of *Urquhart v. Ogdensburgh*, 91 N. Y., 67, and *Mills v. Brooklyn*, 32 N. Y., 489, do not decide that a municipal corporation may escape liability for a defective construction of an improvement merely because it is made in accordance with an approved plan. If a bridge over a ravine or above a water stream was built by a city or village and left without a side guard, or a street was constructed on a causeway high above the natural level of the ground and left without side rails or protection, responsibility for injuries resulting from their absence could not be avoided by showing that they were made in accordance with the plans. Such a doctrine, carried to its legitimate conclusion and result, might release all municipal corporations from the duty imposed on them to maintain the streets within their limits in a safe condition for travel in the usual modes. If the public had the right to require guards for the sides of this street and the failure to erect them was negligence, the city is liable for injuries resulting from their absence.

It is also claimed that the injury resulted from the fright of the horse and not from the defect in the street.

*Held*, Untenable. The duty imposed on municipal corporations to keep the streets in a condition of safety has reference to all ordinary requirements of the public; streets

and highways are made for travel in all the ordinary modes. The animals usually employed on the roads are horses and the roadbeds are constructed with reference to their use, but ordinary care requires also that streets and highways shall be constructed and maintained with reference to all the ordinary exigencies arising thereon. Horses do not reason and are liable to sudden frights, and in their fear and terror they often start suddenly aside from the path of ordinary travel. But a horse is not beyond control when he merely shies or suddenly starts, and when an accident results from a negligent defect on a highway the fact that the horse was at the time unmanageable furnishes no defense for the resulting injury. It was the duty of defendant to protect the public while in the ordinary use of its streets, or at least to use reasonable diligence to do so, and it would be quite too illiberal to hold that the fright of the horse in this case was the cause of the accident. It is a case where it may be said two causes combined to produce the injury, both of which were in their nature proximate: one was the defect in the street, and the other the fright of the horse, for which neither plaintiff nor defendant were responsible. Defendant is therefore liable, because the injury would not have been sustained but for such defect. 77 N. Y., 88; 54 id., 468; 73 id., 365.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P. J.*, concurs; *Pratt, J.*, dissents. (See dissenting opinion, *ante*, 135).



## EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

Mary Campbell, admr'x., *applt.*,  
v. The N. Y. C. & H. R. RR. Co.,  
*respt.*

Decided March 27, 1885.

Plaintiff's intestate was killed by being thrown from one of defendant's gravel cars, upon which he was employed to unload the gravel, by the backing of said car without notice being given to him. Upon the trial plaintiff offered to show "that there was negligence on the part of defendant in not having a proper system of warning the men employed on the train." This was objected to and the evidence excluded. *Held*, Error.

Appeal from judgment recovered on the dismissal of plaintiff's complaint at the circuit.

Plaintiff's intestate was employed by defendant to assist in unloading gravel from one of its gravel cars. The person who was in charge of the work signaled the engineer to back the train, which he did without warning or notice that any change in its position was intended to be made, and the deceased, having no intimation of any such change, was not on his guard or prepared for it, and was thrown from the car and killed.

Upon the trial plaintiff offered to show "that there was negligence in not having a proper system of warning these men."

This was objected to on the part of defendant and the evidence offered was excluded, to which the counsel for plaintiff excepted.

*P. & D. Mitchell*, for *applt.*  
*Frank Loomis*, for *respt.*

*Held*, That the offer was to prove that defendant had been negligent by failing to provide some rules or regulations which should be observed for the security and safety of the men employed before the train should be moved; and the court cannot say that plaintiff would have failed to make the proof if the evidence in the power of plaintiff to produce had been received. That the rule, on the contrary, is that it must be presumed that evidence offered and rejected would have been given if the ruling had placed the party offering it at liberty to give it, and, if it had been given, then negligence on the part of defendant might have been shown which probably caused the death of the intestate. That by the offer plaintiff undertook to make proof to this extent, which, as there was no evidence on which the court could have held the intestate to have been careless, would have justified the submission of the action to the jury. That it was the duty of defendant to guard the intestate against such perils as might have been avoided by the observance of ordinary diligence on its part, and not carelessly to omit to provide rules which, faithfully carried out, would insure safety, 91 N. Y., 332, 338-9, and it was the design of the evidence which was offered to show that defendant had failed to observe this duty.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

# EXAMINATION BEFORE TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Julien T. Davies, rec'r., *applt.*,  
v. James D. Fish, impld., *respt.*

Decided March 4, 1885.

In an action brought by the receiver of the property of an insolvent firm to enforce his claims as receiver to an equitable lien upon the assets in the hands of the assignee of an individual member of said firm for the benefit of his creditors for moneys wrongfully withdrawn from the firm by said individual member while said firm was insolvent, and to reach the proceeds of such moneys, so far as the same can be traced, into the hands of said assignee, such member of the firm who is a defendant in the action can be examined before trial for the purpose of ascertaining what particular pieces of property in the hands of his assignee were purchased with the funds so withdrawn from the firm, in order to enable the plaintiff to prepare his complaint; and an order providing for such examination does not offend against the rule prohibiting a defendant from being examined in such a proceeding as to any matters which might criminate him.

Appeal from an order vacating an order requiring the defendant Fish to appear and be examined as a witness before trial.

This action was brought by plaintiff as receiver of the property of the firm of Grant & Ward against Fish, one of the members of said firm, and the assignee of said Fish for the benefit of his creditors, to enforce his claims as receiver to an equitable lien upon the assets in the hands of said assignee for moneys alleged to have been wrongfully withdrawn from the firm by Fish while said firm

was insolvent, and to reach the proceeds of such moneys, so far as they could be traced into the hands of said assignee. In order to enable plaintiff to frame his complaint an order was procured requiring defendant Fish to be examined as a witness before trial for the purpose of ascertaining what particular pieces of property in the hands of his assignee had been purchased with money wrongfully withdrawn from the firm of Grant & Ward. This order was vacated apparently upon the ground that his examination would tend to establish the commission of some criminal offense by him, and that therefore the case was within the rule established by 27 Hun, 248; 31 id., 233; 5 Abb. N. C., 169.

*Wm. B. Hornblower*, for *applt.*

*S. G. Clarke*, for *respt.*

*Held*, That, if Fish did withdraw from the firm the moneys charged to have been fraudulently received by him, it would not be a criminal offense under the laws of the State. 3 R. S., 6th ed., 969, § 3. That it might have been a fraud upon the other members of the firm and the parties interested in the disposition of its property, but that it was a private and not a public violation of duty on his part, rendering him in no manner amenable to the criminal laws of the State, and he would not therefore be privileged from answering as a witness any questions which might be put to him for the purpose of ascertaining whether he did in fact wrongfully draw moneys from the firm and appropriate such moneys to the purchase, or investing in, property

which it was the object of the action to reach.

Order reversed, and order entered denying the motion made to vacate the order.

Opinion by *Daniels, J. Brady, J.*, concurs; *Davis, P.J.*, concurs, holding that there was no reason why defendant should not be examined even as to matters upon which criminal charges could be predicated, for he had all the usual protection of witnesses upon the trial of actions, and could shield himself under the rule applicable on such trials.

#### ATTORNEY'S LIEN. STOCK.

N. Y. COMMON PLEAS. GENERAL TERM.

William H. Corey v. Richard Harte.

Decided April 13, 1885.

As between the original parties to the transaction a manual delivery of shares of stock is sufficient, without a formal transfer, to support a lien thereon for the purpose of which the delivery was made; and this rule holds good as against a receiver in supplementary proceedings of the property of the party making the delivery. Where an attorney receives from his client shares of stock as security for professional services, and upon demand of a receiver of his client's property appointed in supplementary proceedings delivers the same to said receiver with a written notice of his lien thereon and takes a receipt therefor, he does not thereby surrender or waive his lien.

Appeal from order.

Defendant Harte employed one John F. Baker as his attorney to prosecute plaintiff for alleged false and fraudulent representations in

the sale of seventy-five shares of stock in the Corey Artificial Fuel Co. Baker sued plaintiff, and the action is still pending. Before its commencement he received from defendant seventy-five shares of the stock of said company as security for his professional services. The receiver in supplementary proceedings after his appointment served upon Baker a written demand that he deliver up to him as receiver all and any property, equitable interest, rights and things in action, effects and estate, real and personal, belonging to Harte, the judgment debtor, or in which he had any interest. Baker complied with the demand made upon him by serving upon the receiver at the same time that he delivered the certificates a written notice of his lien and taking the receiver's receipt for the same.

The court below decided that Baker had a priority of lien on the stock, and ordered a reference to ascertain the amount of said lien.

*W. H. Shepard* and *G. T. Hanning*, for applt.

*John F. Baker*, for respt.

*Held*, That there was not such a voluntary, absolute and unqualified delivery of the certificates by Baker as would extinguish the lien, and, as the receiver was about to sell the stock, it was proper for the court below to order that the receiver pay the proceeds into court to await the determination of a reference appointed to ascertain the amount of the lien.

The delivery of the certificates of stock by defendant to Baker to be held by him as security that he

would be paid for the services that had been and would be rendered by him in the action was sufficient to give him a lien upon the certificates without any written transfer or authority to transfer them. The lien was not lost by the delivery of the certificates to the receiver.

Order affirmed, with costs.

Opinion by *Daly, Ch. J., Larremore, J.*, concurs, holding that the main contention is that there was no formal transfer of the stock on the books of the company, and while this objection might avail as to third parties, the stock in question being a chose in action (as between the original parties) would pass by manual delivery. 49 N.Y., 286. The receiver acquired no other or better title than his assignor had, and took the property *cum onere*.

*Van Hoesen, J.*, concurs.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Eli W. La Bombarde, *respt.*, v. The Agricultural Ins. Co., *applt.*

Decided May, 1885.

In an action on an insurance policy one defense was that the insured, in contravention of its terms, had mortgaged hay, a part of the loss, to one S. The testimony of the insured was taken by commission partly upon written and partly upon oral interrogatories. He was asked on the direct whether he had mortgaged the hay to S. In answer he explained the transaction as being a mortgage of hay not grown. On cross-examination he admitted that this was the same hay burned in the ensuing fall. On the trial the plaintiff refused to read this direct interrogatory. For the defense the defendant

offered to read the cross-interrogatories brought out upon this subject by the direct interrogatories. The cross-interrogatories began, "When did you give the bill of sale to S?" Plaintiff objected that there was no proof that such a bill had been given. Upon this ground the court refused to allow either the cross or direct interrogatories on the subject to be read by the defense. *Held*, Error, and that the defense were entitled to read both.

The action was on a policy of insurance to which several defenses were pleaded. Plaintiff had a verdict. Defence, among others, that the insured in contravention of its terms had mortgaged hay, a part of the loss, to one S.

The testimony of the insured was taken by commission partly upon written and partly upon oral interrogatories. On his direct examination he was asked whether he had mortgaged the hay to S., and explained the transaction as being a mortgage of hay not grown. On cross-examination he admitted that this was the same hay burned in the ensuing fall.

On the trial plaintiff refused to read this direct interrogatory. Defendant offered to read the cross interrogatories brought out on this subject by the direct interrogatory. These cross-interrogatories began, "When did you give the bill of sale to S.?" Plaintiff objected that there was no proof that such a bill had been given. On this ground the court refused to allow either the cross or direct interrogatories on the subject to be read by the defense.

*A. H. Sawyer*, for *applt.*

*Cantwell, Paddock & Cantwell*, for *respt.*

*Held*, Error, and that the defense were entitled to read both. Defendant's counsel seems to have had some fear that in reading the 29th direct interrogatory, the one in question, which explains the hay transaction from plaintiff's standpoint, he might waive some rights and "make the witness his own." And the remarks of the court seem to favor that idea. But the witness was not his and a party never vouches for the truth of his opponent's witnesses by any course of questioning. The phrase "making a witness one's own" is misleading. One may contradict his own witness but not impeach him. The answers to the cross-interrogatories in question, Nos 79 to 88, prove a fact which the witness denied on the direct, viz: that the hay on which the bill of sale was given was not the insured hay. The answer to the 84th states that it was the indential hay for which he seeks to recover of defendant. This was very material, and the evidence should have been allowed. There should be liberality on cross-examination and especially so when evidence is taken by commission, and when therefore there is no opportunity to modify the form of a question. And here the defendant's examination on the commission was entirely oral, to which plaintiff might have objected had he chosen to be present. The objectionable form of the question on the cross arose from plaintiff's having of his own accord gone into the matter on the direct and from his having refused to read the direct on the trial.

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Judgment reversed, new trial granted.

Opinion by *Learned J.*; *Bockes, J.*, concurs. *Landon, J.*, concurs upon the ground that if the form of the interrogatory was objectionable in assuming a fact not proven it was so because plaintiff declined to read the direct testimony.

#### EXECUTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Elijah Youngs, sheriff, *applt.*, v. Charles H. Williams, ex'r, *respt.*

Decided Jan., 1885.

A levy upon sheep includes the wool then growing and all that may afterwards grow during the existence of the lien of the execution, and the lien continues as well after as before severance of the wool. Consequently, a subsequent levy upon the wool, after severance, is subject to the paramount lien of the levy made upon the sheep.

Appeal from judgment entered upon report of referee.

Action to recover the price of certain wool purchased at an execution sale; and the facts were these: In Sept., 1873, Arnold, as sheriff of Livingston County, levied upon 324 sheep, the property of Cuyler, the judgment debtor. In April, 1874, Churchill claimed to be the owner of said sheep and brought replevin and took and held the same until June, 1875, when a judgment was rendered awarding restitution of the sheep to Arnold as such sheriff, who placed them in the possession of the judgment debtor until their sale in Sept, 1875. When the sheep were returned to

him wool nearly ready for shearing was growing thereon. This growth of wool was shorn from the sheep by Cuyler in July, 1875, under the direction of and for the sheriff, and the wool was stored with defendant. Afterwards plaintiff, who had succeeded Arnold in the office of sheriff, by virtue of several executions placed in his hands, levied upon said wool as the property of Cuyler. A sale of the wool was subsequently had upon all the executions and bought by defendant, who paid the purchase price to Arnold. The question in controversy was, who was entitled to the proceeds at the sale, the former sheriff by virtue of his levy upon the sheep, or plaintiff by virtue of his levy upon the wool?

The referee held that the levy upon the sheep bound the subsequently growing wool, even when severed from the sheep, and that therefore defendant was not liable to plaintiff.

*J. B. Adams*, for applt.

*Wood & Scott*, for resp.

*Held*, That the decision of the referee was correct; that the wool, after severance, did not cease to be bound by the lien of the levy made upon the sheep; in other words, that the severance of the wool did not operate to release the wool from the levy, though it ceased to be a part of the sheep.

The wool is the product of the unassisted processes of nature, and may be said always to have a potential existence, and is not called into being by any act or assistance of the owner of the sheep. When the sheep came back to A. they

came with all the rights he had at the time of the original levy. Whatever the owner of property might make the subject of a grant or lien could also be made the subject of a levy; and if so, the after growth of wool would follow the original levy, at least while the property was in the hands of the sheriff. "A man may grant all the wool of his sheep for seven years, but this is upheld on the ground that the wool is to be deemed continually growing; hence the grantee has at the time, if not an actual, a potential ownership and possession of the property granted." 20 Barb., 37; 34 id., 9; 41 N. H., 456; Hobart 132, (286).

The growing wool is an incident of the sheep until it becomes an independent entity by being shorn from the sheep, and while growing could not be levied upon as a separate entity, but would follow the principal thing, the sheep. It would be like the natural uncultivated products of the earth, which cannot be levied upon before severance from the freehold. Crock. on Sheriffs, § 456. A levy upon the freehold would also be a levy upon the growing product as an incident of the freehold, so a levy upon the sheep would be a levy upon the wool growing and the wool afterwards to grow. The levy upon the sheep being operative upon the growing wool during all the time the levy continued it disposes of the question of the lien of the execution in A's. hands upon the wool when the sheep were returned to him, unless the severance of the wool by Cuyler, under the direc-

tion of sheriff A., divested the lien of the execution in his hands.

It is claimed that a new and distinct entity springs into existence when the wool is shorn from the sheep, the property in which belongs to the debtor in the execution, and cannot be held by the sheriff by virtue of the levy made prior to its severance. Why should the severance of the wool from the sheep discharge the lien of the execution upon the wool any more than upon the sheep? It cannot be claimed that the loss of the lien springs from the fact that, by reason of the lapse of time, the property which had a potential existence had reached an actual existence. Its potential existence made it as much the subject of levy while an incident to the sheep as if the wool was actually grown.

When the sheep were returned to Arnold as sheriff he took them, not by virtue of a new right, but because the executions he held had always remained paramount to the claim under which they had been taken from his possession, and continued to operate upon the changed condition of the sheep when returned. It is not apparent why the mere severance into parts of that which was a whole should destroy a valid lien upon the whole.

In 61 Me., 108, greenhouse plants were under the lien of a chattel mortgage, and slips had been cut by the mortgagor from the mortgaged plants and potted, constituting new grown plants. An execution against the mortgagor was levied upon these new plants, upon

the assumption that as they had been severed from the old stock and become a distinct entity, created by the labor of the mortgagor, they were no longer covered by the mortgage. But it was held that the mortgage held the property as against the execution. The doctrine of that case would certainly cover the present case.

Judgment affirmed on the opinion of the referee.

*Haight, Bradley and Lewis, JJ.*, concur. *Barker, J.*, dissents.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Solomon Moses et al., *respts.*, v. Peter Bowe, sheriff, *applt.*

Decided March 27, 1885.

In an action against the sheriff of N. Y. Co. the complaint alleged: "That on or about the 22d day of April, 1883, defendant, as sheriff of the City and County of New York, took from plaintiffs a large quantity of goods and chattels, consisting of one hundred and thirteen cases of hats, owned by and the property of plaintiffs, of the value of \$1,891.22, and wrongfully detains the same, to the damage of the plaintiffs \$2,000." *Held*, That facts sufficient to constitute a cause of action were stated.

Appeal from a judgment recovered on the verdict of a jury, and from an order denying a motion for a new trial.

It was alleged in the complaint in this action "that on or about the 22d day of April, 1882, defendant, as sheriff of the City and County of N. Y., took from plaintiffs a large quantity of goods and chattels, consisting of 113 cases of

hats, owned by and the property of plaintiffs, of the value of \$1,391.-22, and wrongfully detains the same, to the damage of the plaintiffs \$2,000."

Upon the trial a motion was made to dismiss the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. This motion was denied.

*Melville H. Regensberger*, for applt.

*Rudolph Sampter*, for respts.

*Held*, No error. That the averment that defendant took the property from plaintiffs was equivalent to an allegation that it had been wrongfully taken by him from the possession of plaintiffs, 9 Barb., 370-372; and as the averment of title in plaintiffs was added, and that the property was wrongfully detained by defendant, the requisite facts were stated from which plaintiffs were entitled to recover the value of the property, as that was alleged in the complaint. 42 N. Y., 251; 3 Hun, 346.

49 N. Y., 259, distinguished.

That an extra allowance should not have been made; that the action was an ordinary simple litigation, including neither difficult questions of law nor of fact, and in such a case no additional allowance can be made. 7 Hun, 184.

Direction for allowance reversed, and judgment so modified, with order denying motion for new trial, affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

## SHERIFFS. BOND OF INDEMNITY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Jas. P. Connor et al., ex'ts, respts., v. William Reeves et al., appls.*

Decided March 27, 1885.

When the sureties on a bond of indemnity given to a sheriff bind themselves absolutely to keep him harmless from any judgment which may be recovered against him for the seizure and sale of property under an execution, they are bound by the regular recovery of a judgment against him although they were not notified of the proceedings in the action resulting in its recovery, and it is not necessary that the judgment should have been paid before the sheriff can proceed against them on the bond.

The sureties on such a bond will be bound when the judgment against defendant has been recovered in good faith and without collusion or fraud, and the consent of the sheriff to its entry, alone, when it may be given in good faith and as the best alternative which can be adopted, will not render a judgment collusive.

Appeal from a judgment recovered on the verdict of a jury, and from an order denying a motion for a new trial.

Defendants were the indemnitors upon a bond given the sheriff of N. Y. county, conditioned to hold him harmless against all liability, judgments, etc., which might arise, accrue, or be brought against him by reason of the seizure and sale of property under an execution.

Such a judgment was recovered against the sheriff, and this action was brought to recover its amount. Defendants claimed that they were not liable therefor, for the reasons that they were not notified of the



bringing of the action against the sheriff until after the recovery of the judgment; that it did not appear that the judgment had been paid, and that it was recovered upon the consent of the sheriff and not after trial.

It appeared that the consent to the recovery of the judgment was given in good faith and in the belief that it was the best that could be done for all the parties concerned.

*Edward D. McCarthy*, for applts.

*Henry Thompson*, for respt.

*Held*, That defendants had bound themselves absolutely to keep the sheriff harmless from any judgment which might be recovered against him for the seizure and sale of the property under the execution, and having bound themselves in that manner they were concluded by the regular recovery of the judgment against him, although they had no notice of the proceedings in the action resulting in its recovery. 44 Barb., 209; 1 Com., 550, 554-5; 34 N. Y., 275, 290-1.

That defendants had assumed to protect the sheriff against liability and against judgment without requiring that either the liability or the judgment should be discharged before he could proceed against them, and therefore it was not necessary that the judgment should have been paid before the commencement of this action. 9 Hun, 469.

15 N. Y., 405, distinguished.

That where the effect of the bond is that the sureties shall be bound by the result of an action brought

against the sheriff, they will be bound when the judgment has been recovered in good faith and without collusion or fraud, 13 Cal., 295, 306; 37 N. Y., 526, 531; 115 Mass., 27, and consent alone to the recovery of the judgment when it may be given in good faith and as the best alternative which can be adopted will not render a judgment collusive.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

### TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

August Meyer, *applt.*, v. Joseph M. E. Thomson et al., *respts.*

Decided March 27, 1885.

One T. conveyed certain personal property to D. upon the following trusts: "To pay all existing debts and liabilities of the grantor, to invest the residue and apply the income thereof to the use of the grantor's wife during her life, and after her death to the use of the grantor for his life, and after the death of both to pay over the principal to their children." In an action brought during the life of the grantor's wife by a judgment creditor of T. to have the trust deed declared void as against him, except in so far as it provided for the payment of existing debts and the trust for the grantor's wife; to have the property transferred by said trust deed adjudged to be vested in the said grantor, subject only to the estate of the trustee for the life of the wife, and to have such estate or interest of the grantor subjected to the payment of the plaintiff's judgment through the medium of a receiver, *Held*, That the deed was valid during the lifetime of the wife, and that there was no estate or interest in the grantor which a receiver could take.

Appeal from a judgment rendered at the Special Term.

Defendant, J. M. E. Thomson, by a trust deed dated June 16th, 1852, gave to defendant Darke certain personal property upon the following trusts: "To pay all existing debts and liabilities of the grantor; to invest the residue and apply the income thereof to the use of the grantor's wife during her life, and after her death to the use of the grantor during his life; and after the death of both, to pay over the principal to their children." In January, 1882, plaintiff recovered a judgment against Thomson, on which execution was issued and returned unsatisfied; and he thereupon brought this action to have the deed mentioned declared void as against him, except in so far as it provided for the payment of existing debts of the grantor and the trust for his wife; to have the property transferred by said trust deed adjudged to be vested in the said grantor, subject only to the estate of the trustee for the life of the wife, and to have such estate or interest of the grantor subjected to the payment of said judgment through the medium of a receiver. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

*Francis Lawton*, for applt.

*De Witt, Lockman & De Witt*, for respts.

*Held*, That there was no doubt about the validity of the trust deed during the lifetime of the wife; that, inasmuch as she might survive her husband, the action was prematurely brought, and that the

mere possibility that defendant J. M. E. Thomson might, at some future time, have an interest in the estate, the whole of which at the time of the bringing of the action was vested in the trustee, was not such an interest as a receiver could take.

Judgment affirmed.

Opinion *per curiam*.

### MORTGAGE. TRUST.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Florence McPherson, *respt.*, v. Patrick Rollins et al., *appls.*

Decided Jan., 1885.

A mortgage conditioned for the payment of an annuity to the mortgagee during his lifetime, and also for the payment to him or the general guardian of the children of the mortgagor, for their benefit, a specified sum annually during their minority, creates a trust in favor of the children and constitutes the mortgagee a trustee of the mortgagors to the extent of their beneficial interest.

And when no power of revocation is reserved to the creator of the trust or conferred upon any other person, the mortgagee cannot, even with the consent of the mortgagor, give a valid discharge or certificate of satisfaction of the mortgage; and especially so in the absence of a consideration.

The record of such a mortgage is constructive notice of its provisions sufficient to put a purchaser upon inquiry, and of the want of power of such mortgagee to discharge the mortgage.

Appeal from judgment entered upon report of referee.

Action to foreclose a mortgage; the facts were these: In 1873, Andres Deming conveyed to his two daughters, Fannie and Julia, all his real estate, in consideration

whereof they executed to him a mortgage conditioned for the payment to him of a certain annuity during his life, and also for the payment to him, or the general guardian of the children of said Fannie, a specified sum annually for their benefit until they became of age. The mortgage and the deeds were duly recorded, and the former was delivered to the mortgagee and kept in his possession. In the following year the mortgagee, at the request of the mortgagors, executed a discharge and certificate of satisfaction of the mortgage, which was recorded and an entry made on the margin of the record of the mortgage referring to the record of the discharge. In the same year the mortgagors and owners conveyed the property to defendants, who, the referee found, had no actual knowledge of said mortgage as a subsisting lien or incumbrance upon the property.

At the time of the execution of said mortgage Fannie had been divorced from her first husband, who was the father of said children, and had remarried. From 1873, the children being then fourteen and eleven years of age respectively, until 1878, they were mainly supported by their mother, when they went to reside with their father, who had been at all times sufficiently able to educate and maintain them. The referee found that no part of the said annuity had been paid to said children, or to their trustee for their benefit, and he ordered a judgment of foreclosure and sale for the payment of the amount due.

*John R. Strang*, for appls.

*Abbott, Rohrbach & Abbott*, for respt.

*Held*, That a valid trust was created in favor of the children, and the mortgagee took and held the mortgage, in part, as their trustee. 75 N.Y., 134, 139, and cases cited; 80 id., 438; Hill on Trustees, 130. The fund was not created for the mortgagee, for he was provided for by a different clause of the instrument, a distinction both useless and absurd if in his own right he was the sole subject of both promises.

*Held also*, That the mortgagee, being also a trustee of the mortgage, had no power to revoke the trust, or discharge the mortgage, which was equivalent to a revocation; and especially so when there was no consideration.

No power of revocation was reserved to the creator of the trust or to any other person, and the right to change the essential provisions of a trust, far less to annul the trust itself, is not to be implied in favor of the person bound to execute it. Perry on Trusts, § 466.

But it is said that Deming was mortgagee, and as such had the apparent right to receive all payments and thus satisfy the mortgage; that his discharge, duly executed, acknowledged and recorded, was sufficient to protect subsequent *bona fide* purchasers for value and without notice, actual or constructive, of the existence and provisions of that instrument, against the lien thereby created. This brings us to the question of notice.

*Held*, That the record was con-

structive notice of the provisions of the mortgage and of the trust thereby created, or, what is the same in effect, notice sufficient to put the purchaser on inquiry as to the trust in question.

The recording acts require due vigilance upon the part of those giving this notice, and of those affected by it; the one must record his claim and the other search for it with all reasonable expedition and thoroughness. 13 Hun, 479; 82 N. Y., 32; 35 Barb., 330.

In view of these decisions, what is the situation of these parties? The mortgage was duly recorded with the deed to which it referred, and through which defendants derive title to these premises. The mortgage showed the trust, the power of the trustee, the age of the *cestuis que trust*, and consequently his inability to discharge the instrument in their favor, and that of the infants to sanction such change even if desired. 50 N. Y., 415; 1 id., 423; 7 Barb., 354, 367; Perry on Trusts, §§ 466, 814, 831; Story's Agency, § 146. Having given public notice of the claim of the children in the records, those who acted in their behalf had done all in their power to protect their interest and secure the public against the frauds or mistakes of former owners and mortgagees. Defendants, on the other hand, concluded their purchase without a personal examination of the records, or procuring such examination to be made. They undoubtedly believed they had secured a good title, a belief induced mainly by their confidence in those with

whom they dealt, and partially confirmed by a defective search shown to them, in which the mortgage was not even mentioned.

The whole record, if diligently examined, would disclose the trust, the age of the beneficiaries, and that D. as their trustee could not discharge the lien of the mortgage to their prejudice. The record which showed the discharge, if followed up, would show its invalidity. The inquirers had only to read and learn all that was necessary for their protection. Defendants failed to do this; and between these parties, both innocent, which should suffer—the children, who used every measure required by law with more than ordinary diligence to apprise these purchasers of the trust in their favor, or defendants, who neglected all the usual precautions, and risked their investment upon such outside information as could be obtained without expense or trouble?

The cases cited above furnish the answer to this question.

Judgment affirmed on the opinion of the referee.

*Haight, Bradley and Childs, JJ., concur.*

#### APPEAL. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William S. Douglas, assignee, *applt.*, v. James A. Stockwell, sheriff, *respt.*

Decided May, 1885.

No appeal lies from an order denying a motion for judgment upon the ground that the answer is frivolous.

Where an answer sets up as a defence an attachment and the attachment was subsequently vacated, *Held*, That a motion to strike out the averments as to the attachment as sham was improper.

The creditor who procured the vacated attachment subsequently obtained a new attachment. Upon a motion for leave to serve a supplemental answer, and to set up, among other things, this last attachment, and also an attachment in favor of another creditor, *Held*, That the motion was properly granted.

Plaintiff is assignee of one Beerworth under a general assignment for benefit of creditors, dated Jan. 28, 1884.

This action was commenced April 2, 1884, to recover goods of the assignor taken away by defendant. The latter justified, that the assignment was fraudulent, and that he took the goods upon an attachment in favor of a creditor, Wilson, issued March 10, 1884. On Sept. 2, 1884, in Wilson's action the attachment was vacated. Plaintiff here then moved to strike out of the answer the allegations as to Wilson's attachment as sham, and for judgment upon the rest of the answer as frivolous. While this motion was undecided, defendant here moved for leave to serve a supplemental answer, setting up an attachment obtained by Wilson Sept. 27, 1884, and also one in favor of one Houston, issued in April, 1884; also setting up that Beerworth was a resident of Canada, whose laws forbid such assignments. These motions coming on for decision together, the court denied plaintiff's motion, and granted defendant's.

*Cantwell, Badger & Cantwell*, for applt.

*Beman & Munsill*, for respnt.

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*Held*, That no appeal laid from the order denying the motion for judgment on account of the frivolousness of the answer. Code, § 537; 34 Hun, 429. As to the motion to strike out, the averment that an attachment had issued in favor of Wilson was true when made. It was material. The answer avers that the property in question was the property of Wilson and not of plaintiff. The setting aside of that attachment does not affect the truth of the answer when sworn to. We have examined the practice laid down in *Clark v. Clark*, 7 Robt., 276, and we disapprove it.

The supplemental answer was properly allowed. Unless the pleading is clearly bad or frivolous the party should be allowed to serve it, leaving the other party to demur or take advantage of its inefficiency on the trial. Defendant should be allowed to justify under the attachment in favor of Houston, 19 W. Dig., 421; 48 N. Y., 6, and probably under the second attachment in favor of Wilson.

Appeal from order denying judgment dismissed, with \$10 costs, and the rest of the order affirmed, with \$10 costs.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### STATUTES. CORPORATIONS.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. The Eden Musee Co., *applt.*, v. Joseph B. Carr, Secretary of State, *respnt.*

Decided May, 1885.

Sec. 15 of Ch. 611, Laws of 1875, prescribing the mode in which the stock of certain business corporations shall be reduced, has been repealed, by implication, by Ch. 264, Laws of 1878.

Appeal from order denying relator's motion for a mandamus to compel the Secretary of State to file and record a statement of the reduction of its capital stock, made pursuant to § 15 of chap. 611, Laws of 1875. The relator was incorporated under this statute Sept. 22, 1882. The Secretary refused to file the statement.

*C. & A. Van Santvoord*, for applt.

*D. O'Brien*, Att'y Gen., for respt.

*Held*, That the relator having been incorporated after 1878 was controlled as to reduction of stock by the statute of that year. By its terms the act of 1878 does not apply to corporations organized before its passage. But it controls all corporations of that class organized since. It does not amend the act of 1875. Its provisions are more stringent, and afford greater protection. No corporation would follow the requirements of the act of 1878 by choice.

Order affirmed, with costs.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### CONSTITUTIONAL LAW. TAXATION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respts.*, v. The Board of Supervisors of Ulster Co., *applt.*

Decided May, 1885.

Ch. 382, Laws of 1879, ch. 402, Laws of 1881,

and ch. 516, Laws of 1883, acts which, as to certain counties, provide a new method for the collection and payment of arrears of the state tax, are constitutional.

By the general system of taxation, chap. 427, Laws of 1855, the Comptroller is to charge the several county treasurers with the amount of the state tax of their counties. The county treasurer shall report to the Comptroller the taxes not paid, and as to these arrears the latter shall give the county treasurer credit. If the tax remains unpaid two years the Comptroller shall sell so much of each parcel as will be sufficient to pay the taxes, interest and charges thereon. And where no person bids upon a lot, the Comptroller shall bid it in for the state. By chap. 65, Laws of 1878, a change was made as to three counties; by this statute the county was to pay the whole state tax without regard to arrears, and the county treasurer was to sell the lands, etc., in much the same way as the Comptroller had theretofore done. By chap. 200, Laws of 1879, Ulster was included in this method. The two last above statutes provided that where no person bid the county treasurer should bid in the lot. A further statute, chap. 382, Laws of 1879, was passed to bring a sale by the Comptroller already had in 1877 in harmony with the new system; by it the Comptroller was directed to transfer to the counties the certificates of sale owned by the state for lands bid in in 1877, and he was to charge the counties with what the land had brought. In 1881 chap. 402 was passed,

amending the general act of 1855, chap. 427, and it was thereby made the duty of the Comptroller at tax sales to bid in for the counties in question lands in those counties for which there were no bids, and said counties were required to pay the sums thus bid upon receiving the certificates of sale. In 1883 chap. 516 was passed, which was a repetition as to the sale of 1881 of the law passed (*supra*) in 1879 with regard to the sale of 1877. The Comptroller has complied with these laws; under them an amount is due the state from Ulster, which that county refuses to pay. In each of the years 1879 to 1883 inclusive, the county has sold lands for unpaid taxes under chap. 65, Laws of 1878; most of the lands have been sold to the county, and certificates have been issued to it. The county treasurer, in his reports of 1880, 1881 and 1882, has credited the county with amounts received from state certificates.

The People at Special Term obtained an order granting a peremptory mandamus requiring the Supervisors to raise by taxation the amount due the state. Defendants appeal.

*J. N. Fiero*, for applt.

*D. O'Brien*, Att'y Gen., for respts.

*Held*, That the acts in question are constitutional. They authorize the Comptroller to charge certain amounts against the county. The taxing power of the legislature and its manner of execution for public purposes is unlimited, except as specifically restrained by the Constitution. 56 N. Y., 261; 4 *id.*, 419; 13 *id.*, 143. Within the doctrine of these

cases such a charge could be made. But in fact this is not the case of a charge arbitrarily imposed. The statutes in question only change the manner in which a state tax is collected. They place the duty of selling lands for unpaid taxes upon the county, and charge the county with the arrears instead of having them assumed by the state. The land is the ultimate fund from which the tax comes. Defendants are in error in saying that the bid may be very much in excess of the value of the land, and that therefore this is (or may be) not the collection of a tax. By statute only so much of the land shall be sold as will satisfy the tax, interest and charges. Hence the county is protected.

These statutes are not in conflict with § 20, Art. III, Const. They do not impose, continue or revive a tax. They only modify the process of collecting a tax already imposed.

Nor do they conflict with §§ 1 and 6, Art. 1, Const. They do not deprive a member of the state or a person of property without due process of law. That provision of the Constitution does not take away the power of taxation. 13 N. Y., 145. The legislature "can under the power to levy taxes apportion the public burthens among all the tax-paying citizens of the state or among those of a particular section or political division." Counties are only political divisions. 92 U. S., 307; 11 N. Y., 392; 23 Barb., 340; 67 N. Y., 109.

Order affirmed, with costs.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

## EXECUTORS. TRUSTS.

## N. Y. COURT OF APPEALS.

Barry, *respt.*, v. Lambert, surviving ex'r., *applt.*

Decided March 3, 1885.

Where the will directs the estate to be kept invested and a profitable investment offers larger than the available assets, the executors have power to supplement them with other funds if they can be legitimately obtained from other persons.

Executors are not precluded from acting as trustees upon other trusts for other beneficiaries if the transaction is not inconsistent with the duties they owe as executors.

Declarations of one executor *in extremis*, sustaining plaintiff's claim that an interest in a mortgage held by the estate belonged to him, is admissible against the executor.

This action was brought to have a bond and mortgage held by defendant as executor of the will of L. declared to be held in trust for plaintiff, and to compel defendant to assign any interest he claimed therein. The will of L. directed his executors to keep the funds of his estate invested. In January, 1882, they had on hand \$6,000 belonging to the estate. An application for a loan of \$8,000 was made to them, and plaintiff alleged that in order to enable them to make the loan she delivered to one of the executors \$2,000, under an agreement that said sum should, with the \$6,000, be invested in a mortgage for \$8,000, \$2,000 thereof should be held by the executors in trust for her benefit. Plaintiff was allowed to prove, under objection and exception, declarations by one of the executors, now dead, made in plaintiff's presence and in the

presence of others, at a time when she was in very feeble health and her death was anticipated, sustaining the allegation of the complaint that an interest of \$2,000 in the \$8,000 mortgage belonged to plaintiff, and that she intended to make an acknowledgment to that effect, either by her will or in a separate instrument before she died.

*William E. Osborn*, for *applt.*

*N. C. Moak*, for *respt.*

*Held*, That the evidence was properly received; that the declaration proved operated as a perfect declaration of trust sufficient to charge the property then in the hands of the executors with the obligations of the trust, 59 N. Y., 320; 69 *id.*, 137; 6 Beav., 507; Perry on Trusts, § 842; 92 N. Y., 240; L. R., 5 Ch. App., 358; 4 De G., M. & G., 53 Eng. Ch., 372; Hill on Trusts, 130; 75 N. Y., 140; 80 *id.*, 438; 91 *id.*, 297; 18 Vesey, 140; that making the declaration was an act done in the performance of the duty of an executor, which operated upon and was enforceable against the estate of her testator.

Co-executors constitute an entity. The acts of any one in respect to the administration of the estate are deemed to be the acts of all. Williams on Exrs., 810-812; 9 Cow., 34; 4 Hill, 492; 11 Johns., 513-16; 1 Wend., 583.

Under the provisions of the will, in case a profitable investment offered itself larger in amount than the available assets of the estate, it was within the power of the executors to supplement them with other funds if they could be legiti-



mately obtained from other parties.

There is nothing in the office or obligations of executors that precludes them from acting as trustees upon other trusts and for other beneficiaries if the transaction is not inconsistent with the duties they owe as executors.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Ruger, Ch.J.* All concur.

### SURETYSHIP.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *appls.*, v. Thomas W. Cushing, *respt.*

Decided May, 1885.

In 1880 defendant with others executed as surety a bond to secure the performance by a bank, designated as a depository for canal tolls, of an agreement as to such deposits made by it with the State. At the end of 1880 the Bank had on hand a large State deposit. In 1881 the bank was again designated and a new bond given and accepted by the state upon which defendant was not a surety but one Z. was, the other sureties remaining the same. In 1882 the bank failed. In an action on the bond of 1880 to recover the balance due the State at the end of that year, *Held*, that in the absence of any proof that the bond of 1881 was agreed to be taken by the State in lieu of the bond of 1880, or that the latter bond was cancelled or surrendered, defendant was liable.

The First National Bank of Buffalo was first designated in 1879 as a depository for canal tolls. Such a bank executes an agreement with the State as to the terms and conditions upon which the bank shall hold the moneys. It also

gives a bond to secure the performance of the agreement. In 1879 it received moneys, and when in March, 1880, it was again designated it gave another agreement and the bond in suit. It had then on hand \$65,000 of the state moneys. During the year it received further moneys and at the end of the year there was still due the State \$72,000. In 1881 it was again designated, gave a new agreement and a new bond with the same sureties as in 1880, except that one Zink executed it in place of defendant. At the end of 1881 the balance in favor of the State was \$70,400. The bank became insolvent in 1882.

This action is against a surety on the bond of 1880 for the amount on hand March 30, 1880, and the deposits of 1880 less the amounts paid the State. The referee found for defendant.

*D. O'Brien*, Att'y Gen., for *appls.*

*D. F. Day*, for *respt.*

*Held*, Error. Defendant claims that because the State accepted the bond of 1881, upon which he was not a surety and upon which Zink was, it is an accord and satisfaction and that defendant is discharged. It is not claimed that there was any surrender or cancellation of the bond of 1880. Nor is it claimed that the Canal Board by any contract oral or written agreed to release defendant upon its receiving the new bond furnished by the Bank. The People do not claim for anything after the giving of the bond of 1881. When the bond of 1881 was given the defendant was liable on the bond of 1880 for

moneys actually received on deposit by the Bank and not paid over. In the bond of 1881 there was a clause making those sureties also liable for the money then on deposit. By this defendant is not injured. It probably gives him a right of contribution against the sureties of 1881. No agreement was made in the matter and we cannot see how the acceptance of additional security, merely, released the surety.

Judgment and order reversed, new trial granted, referee discharged, costs to abide event.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### FORECLOSURE.

##### N. Y. COURT OF APPEALS.

*Wyckoff, respt., v. Scofield et al., applts.*

Decided March 17, 1885.

When an injunction pending foreclosure of a mortgage forbidding the mortgagor to collect the rents but allowing his agents to do so and retain them subject to the order of the court is vacated, the parties stand in the same position as though no injunction had been granted and the rents collected by the agents belong to the mortgagor.

The court has no power to order rents already collected and in possession of the mortgagor to be paid over and applied on the mortgage debt.

This action was brought to foreclose a mortgage. At the time it was commenced an injunction was granted restraining the defendant S., who was the owner of the mortgaged premises, from collecting the rents. A copy of this order was duly served on S., with

notice of a motion for the appointment of a receiver. This was afterwards modified by the agreement of the parties so as to permit the agents of S. to continue to collect the rents and retain them, to abide the further order of the court. Upon the hearing of the motion the court vacated the injunction and denied the motion. Subsequently a similar order was granted and upon another motion a receiver was appointed, who obtained an order directing the agents of S. to pay over to him all the rents received subsequent to the granting of the first injunction.

*Abner C. Thomas*, for applts.

*Samuel A. Noyes*, for respt.

*Held*, Error; that the dissolution of the injunction left the parties in the same condition as though it never had been issued, and the agents of S. thereafter held the rents they had collected solely by virtue of their authority as agents and their possession was his. The stipulation operated simply as an amendment to the injunction, and was valid in affecting the defendant's interests only to the extent that the court had power to affect them by such an order, and it was intended by it that the rents collected should be held subject to the order of the court, and when the injunction was vacated there remained no obstacle to the assertion by him of his rights to the rents collected.

A mortgagee has no claim as such to the receipt of the rents and profits of the mortgaged property. 78 N. Y., 242.

In a proper case upon foreclosure

he may have a receiver of such rents, etc., appointed, who will then be entitled to collect and apply them in reduction of the mortgage debt, and in such a case the receiver may be authorized to collect such rents as have theretofore accrued but have not yet come to the hands of the owner of the equity of redemption. 94 N. Y., 342.

It is not within the power of the court to order rents already collected and in the possession of the owner to be paid over and applied on the mortgage debt. 10 Paige, 43; 84 N. Y., 461; 78 id., 242; 3 Sandf. Ch., 71.

Order of General Term, affirming order of Special Term, reversed.

Opinion by *Ruger, Ch. J.* All concur.

## EXECUTION. TRUST.

### N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William H. Salisbury, *respt.*, v. Thomas U. Parsons, *applt.*

Decided April, 1885.

Where the *cestui que trust* is permitted by the trustees to occupy the land and cultivate it for his own benefit, as provided by the will, the products of his labor are not "held in trust" for him and thus exempt from execution, but are his property free from any trust and subject to levy and sale.

Appeal from a judgment of county court, affirming the judgment of a justice of the peace.

Action to recover damages for the conversion of a quantity of wheat, which was levied upon and sold by direction of defendant, under an execution issued upon a judg-

ment against plaintiff. Plaintiff claimed that the wheat was trust property and not subject to levy and sale upon an execution. Plaintiff's father died seized of the lands on which the wheat was grown, and devised the same to Abram Salisbury, "to have and to hold during the life of my son, Wm. H. Salisbury, (plaintiff) in trust for his benefit, or for the benefit of his family, subject, however, to the following conditions: If the said Abram and Guy Salisbury think it would be for the best good of my son or his family, they may let him occupy the land free of rental, or otherwise, as they may agree; but they shall not, in any case, grant the occupancy to him for more than one year at a time. Said land cannot be let or rented only by agreement of said Abram and Guy, or their chosen successors; and they may let the same to other parties than my son, or they may sell and transfer the land, and reinvest the proceeds in real estate, or put it on interest and be kept inviolate. They may appropriate the interest upon the money held in trust, or the use or income of any real estate held in trust by said Abram, for the benefit of my son or his family, to either his or their benefit."

Plaintiff occupied the premises with his family, by leave of the executor (Abram) and Guy Salisbury, under the provisions of the will, and the wheat in question was raised by him thereon. He had the entire management of the farm, paid the taxes, hired the help, and paid them with the money

received from the sales of the products of the farm.

*M. S. & B. J. Hunting*, for applt.

*David Millar*, for respt.

*Held*, Assuming that a valid trust for the receipt of the rents and profits and to apply the same for the support of plaintiff and his family was created, and that the whole estate, in law and in equity, was vested in the trustee, subject only to the execution of the trust, that as the wheat in question was not held in trust for the judgment debtor, but was in part the product of his own skill and labor, and he was permitted to occupy the premises and receive the profits thereof, it was not exempt from execution. Code, §§ 2,463, 1,390-1. It is a familiar rule, that property exempt from levy and sale on execution remains so only so long as it maintains its identity and is kept intact.

No power or control appears to be given to the trustee during plaintiff's occupancy of the land; no judgment or discretion is vested in him in reference to its control and management.

Judgment reversed.

Opinion by *Haight, J.*; *Barker, Bradley*, and *Corlett, JJ.*, concur.

#### DIVORCE. REFERENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Emily M. Goodrich*, respt., v. *William J. Goodrich*, applt.

Decided April, 1885.

An order of reference in a divorce suit "to

hear, try and report to this court with his opinion," entered upon a stipulation of the parties made after issue joined to refer the cause for "hearing, trial and determination," is to be construed as an order for the trial and determination of the issues, and it is the only proper order that could be made by the court.

The court, at Special Term, has no power to review the findings of the referee on questions of fact and to find the facts contrary to the findings of the referee; but if it appears that the proceedings have been regular, free from fraud or collusion, and that the evidence is sufficient to uphold the findings of fact, it is the duty of the court to enter judgment upon the report.

Appeal from judgment entered on report of referee, and from order confirming report and allowing entry of judgment thereon, and also from order denying defendant's motion to correct the order of reference.

Action for a separation on the ground of abandonment and neglect to support plaintiff. The answer set up the ill conduct of plaintiff in justification. After issue joined, the parties made a stipulation in writing referring the same to T. C. White "for hearing, trial and determination." Upon this stipulation an order was entered, on motion of defendant's attorney, referring this cause to said White "to hear, try and report to this court with his opinion." Upon the coming in of the report plaintiff's application for judgment was denied, and it was "referred back to the same referee to take such other and further proofs as either party may present upon the issues, and then upon all the proofs before him that he may make his report, passing upon all the issues, both of fact and law, referred to him by

the order of reference." In pursuance of this order the referee made his report, passing upon all the questions embraced within the issue made by the pleadings, upon which report plaintiff was, upon application to the court, allowed to enter judgment.

*E. B. Vedder*, for applt.

*E. W. Hatch* and *Chas. E. Forsyth*, for respt.

*Held*, That the order of reference entered on the stipulation of the parties is to be construed as an order to hear, try and determine the issues joined by the pleadings, as it was the only proper order to be made by the court on filing the stipulation, 30 Hun, 154; and the order denying the motion to amend and correct the order of reference should be affirmed.

The judge at Special Term held and decided that the court at Special Term had no power to review the findings of a referee on questions of fact and to find the facts contrary to the finding of the referee; but if from an inspection of the report of the referee and evidence taken before him it appears that the proceedings have been regular, free from fraud and collusion, and that the evidence is, in its strength, nature and character, sufficient to uphold the findings of fact, that it becomes the duty of the court to enter judgment upon the report of the referee. In reaching this conclusion the learned justice followed the decision in *Schroeter v. Schroeter*, 23 Hun, 230, which is an authority directly in point and decisive of this question, and necessarily leads to an affirmance of

the order granting leave to plaintiff to enter judgment on the report of the referee.

Judgment and orders affirmed, with costs.

Opinion by *Childs, J.*; *Haight* and *Bradley, JJ.*, concur.

#### ASSIGNMENT FOR CREDITORS. EXAMINATION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re* assignment of Alfred Wilkinson et al. to Charles E. Hubbell, applts.; application of John H. Poune, respt.

Decided April, 1885.

An order for the examination of the assignor and assignee will not be denied, or if granted will not be vacated, on the ground that such examination may develop fraudulent transactions on the part of the assignor and assignee sufficient to set aside the assignment.

Where the petition shows that there is reasonable ground for apprehending that there has been a fraudulent disposition of assets, or a fraudulent omission thereof from the inventory, or that fraudulent claims have been placed upon the schedules, an examination should be ordered.

Appeal from order refusing to vacate an order for the examination of the assignors and assignee.

Dec. 9, 1884, A. and J. F. W. made a general assignment to H. for the benefit of creditors, which was recorded Dec. 10, 1884. The assignee accepted and entered on the discharge of his duties. Dec. 20, 1884, an inventory and schedules were filed in which P. is recognized as a creditor in the sum of \$658.72, the full amount claimed by him.

Jan. 1, 1885, upon the petition of P. and accompanying affidavits, which set forth that shortly before the assignment the assignors conveyed to relatives by deed and mortgage a large amount of real estate for an inadequate consideration, that the inventoried liabilities greatly exceed the inventoried assets, and other facts tending to show that the inventory is incorrect, the assignors and assignee were ordered to appear before the County Judge and be examined and produce the books and papers of the assignors, pursuant to § 21 of the General Assignment Act.

Motion was then made by the assignors and assignee to vacate said order on an affidavit by counsel which stated on information and belief that the application of P. is made in the interest of creditors proceeding in hostility to the assignment, and not for the benefit of said assigned estate. The only fact stated as a foundation for the belief is that petitioner's attorneys are the attorneys of twenty creditors of the assignors who have commenced actions to put their claims in judgment, and deponent believes that said creditors intend to bring an action or actions to set aside the assignment. The motion was denied.

The only ground urged for reversal is that if petitioner's allegations are true the evidence discovered would support an action to set aside the assignment as fraudulent.

*Louis Marshall*, for applts.

*Frank H. Hiscock*, for resp't.

*Held*, That the order appealed from was correct. By the exami-

nation authorized by the twenty-first section the legislature intended to enable persons interested in the assigned estate to discover the assignor's assets applicable to the payment of his debts, so that they may be pursued and recovered by the assignee; and also to ascertain the actual liabilities of the assignor, to the end that the assets may be justly distributed among the real creditors, instead of upon fictitious and overstated claims. Subdivision 4 of § 20 and § 26, Gen. Ass. Act, provide for the determination of disputed claims. Overstated claims may be reduced, 44 Barb., 192, and fraudulent or illegal ones may be rejected, 1 Am. Ins. R., 56; *id.*, 281; Burr. Ass., 3d ed., § 428. Examinations are not limited by the act to transactions in connection with the assigned estate occurring since the assignment.

Admitting, as all must, that it is the legal right of the creditors to discover by the examination, 1st, the assets; 2d, the amount which each person is entitled to receive from the assignee, it is illogical to say that because the petitioner, in pursuing his rights, may develop fraudulent transactions on the part of the assignors and assignee sufficient to set aside the assignment at the suit of other creditors, that the examination must not be ordered, or if ordered must be discontinued and the assets left uncollected, or that the avails of those collected be distributed to persons not entitled to dividends. No court has so construed this section, and the cases cited by appellant's coun-

sel do not sustain the position. See 56 How., 359.

*In re Burtnett*, 8 Daly, 363; *in re Goldsmith*, 10 Daly, 112; *in re Brown*, 10 Daly, 115; *in re Koonz*, 11 W. Dig., 55; *in re Sweezy*, 62 How., 215; 64 *id.*, 353; 10 Daly, 107; *in re Isidor*, 59 How., 98, explained and distinguished.

When the petition shows that there is reasonable ground for apprehending that the assignor has fraudulently disposed of his assets, or that the assignor or assignee have fraudulently omitted assets from the inventory, or placed upon the schedules claims which are fraudulent in whole or in part, an examination may and should be ordered.

The order is not objected to because it does not state the subjects to be inquired into, or in anywise limit the scope of the examination, nor is it objected that the information upon which petitioner founds his belief is not set forth in the petition.

Order affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### PLEADING. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William T. Brooks, *applt.*, v. Daniel M. Hanchett, *respt.*

Decided April, 1885.

An order or stipulation extending the time to answer the complaint implies an admission that it is sufficient in form to require an answer, and is a waiver of the right to move to make more definite and certain or to require the plaintiff to sepa-

rately state and number the several causes of action alleged, unless the right is expressly reserved.

Appeal from an order requiring plaintiff to separately state and number the several causes of action set forth in his complaint.

The complaint was served Aug. 2, 1884. Defendant's time to answer or demur was extended by stipulation until Sept. 18. The motion papers herein were served on that day. The time to serve answer was again extended to and including the first day of October by an order of the county judge. The order was not dated, and the court was unable to determine whether it was procured before or after the time to answer or demur, as extended by stipulation, had expired.

The notice of motion was for an order to compel plaintiff to separate and number the several causes of action alleged, and that the complaint be made more definite and certain.

*John H. White*, for *applt.*

*J. D. Decker*, for *respt.*

*Held*, That a motion to correct a complaint on the ground of its being uncertain or indefinite must be made within twenty days from the service thereof. Rule 23; 1 Abb., N. S., 406; 8 How., 237; 21 *id.*, 234; 7 Robt., 164; 4 Sandf., 705.

*Held also*, That as defendant did not reserve the right to move to correct the complaint, either in his stipulation or in the order obtained, he waived all such objections to the complaint. It involved an admission that the complaint is in form

sufficient to require an answer. 5 Sandf., 657; 3 Abb., N. S., 266; 34 How., 238.

Order reversed, with ten dollars costs and disbursements and the motion denied, but with leave to defendant to answer or demur within ten days after the service of a copy of this order.

Opinion by *Haight, J.; Barker* and *Bradley, JJ.*, concur.

### WILLS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John M. Avery, *respt.*, v. George Everett et al., *appls.*

Decided April, 1885.

A will providing for an estate in remainder in case of the death of another, refers to a natural and not a civil death.

At common law, a felon imprisoned for life could acquire an estate by grant or devise, which would not devolve upon his heirs by reason of his civil death, nor in such case would an estate in remainder dependent upon his "death" vest in interest or in possession.

Appeal from judgment entered upon the decision of the court on a trial before the court without a jury.

Action to recover possession of lands devised to defendant's lessor, Charles H. Southwick, by the last will of his father. The will devised to the widow all testator's real estate as long as she should remain unmarried, "but on her decease or remarriage then what remains of said real or personal property I give and devise to my son, Charles

H. In case he should die without children, then after my wife Eliza Ann's death, and my son Charles H.'s death, my will is, all the property, real or personal, that may remain, shall go to Augustus Southwick." After testator's death, and during the lifetime of his mother, Charles H. was sentenced to State Prison for life, and was there confined at the time of the trial. He was unmarried and had no children. After the widow's death Augustus Southwick conveyed the land to plaintiff, and defendants are in possession under a parol lease from Charles H.

The court below held that plaintiff was entitled to recover the land; that the will referred to a civil as well as a natural death, and that as Charles was dead "in the eye of the law" the remainder to Augustus took effect.

*Rhodes, Coons & Higgins*, for *respt.*

*Wm. Tiffany*, for *appls.*

*Held*, That as the words of a will must be given their ordinary meaning, except where some other is necessarily or clearly indicated, the word "death" must be construed to mean natural death only; that the testator could not have had in contemplation the civil death of his son and intended to provide for that event.

*Held also*, That at common law upon conviction for a felony and sentence to imprisonment for life the felon's estate would not descend to his heirs, nor would an estate in remainder vest in possession.

The statute provides that the



felon shall "be deemed civilly dead." 3 R. S., 994, § 40, 6th ed.

What is meant by civil death and what are the consequences resulting therefrom? At common law the disability of the felon was not considered to be the strict civil death that attaches to persons entering into religion or who have been banished the realm. He could not bring an action or enjoy his property, but he could be charged in a civil suit and be compelled to plead to the merits. He could acquire, even though he could not enjoy. He could purchase lands to him and his heirs, and could lease and demise, and his estate would not descend to his heirs. Coke Litt., 200; 1 Blackst. Com., 132; 2 B. & Ald., 268-275; 5 B. & Adolph., 765; L. R., 1 Com. Pleas, 389, 397, 400; 6 Johns. Ch., 118-127.

The laws of 1799 provided that the felon "shall be deemed and taken to be civilly dead *to all intents and purposes in the law.*" In 24 Johns. Ch., 248, Chancellor Kent said that this act was only declaratory of the existing common law, and enacted for greater caution. But in 6 Johns. Ch., 118-127, he again referred to this question and to his former opinion, and stated that he did not pursue the subject to the extent that he should have done; that he has since had the benefit of a full and able discussion, and of a diligent and accurate research upon the question. He laid particular stress upon the language of the statute, and appears to have reached the conclusion that the statute did effect a change

in the common law. Under this statute it was held that a suit against the felon is abated. 2 Johns. Cas., 407. That a pardon would not affect the administration upon his estate, but would restore him to the relation of father and give him the right to the custody of his children. 10 Johns., 232. Upon the revision of the statutes, the words "to all intents and purposes in the law" were omitted. This change was for a purpose; the object was to place the felon under no greater disability than existed at common law. Service of process upon the felon in State prison is valid and gives the court jurisdiction. 1 Abb. Ct. App. Dec., 486. If the effect of his sentence was to transmit his personal estate to his administrators, and devolve his real estate upon his heirs, should not his creditors resort to the administrators instead of the felon?

He may be a witness in civil and criminal actions, and a *habeas corpus* may issue for that purpose. The Revised Statutes (in force at the time of Mrs. Southwick's death) providing for the determination of the fact whether a person having a prior estate for life is alive or not, provided that if the life tenant is in prison he shall be produced upon *habeas corpus* and his identity established. 2 Rev. Stat., 343-7.

If it appears that the life tenant is dead, possession of the lands shall be awarded to the remainderman; but there is no provision that possession shall be awarded because of civil death. Consequently, if Augustus Southwick had instituted these proceedings, the court

would be bound to discharge them and award costs against him. These provisions, with a few changes, are now embraced in the Code. §§ 2302-2319.

The remark of Balcolm, J., in 10 Abb., 370, to the effect that the rights and liabilities of a person civilly dead are as entirely gone as though he were actually dead, was not necessary to the decision of the case, and not well considered.

The conclusion is that the effect of the civil death of a person convicted of felony is to be determined by common law; and by that law the felon's estate did not descend to his heirs, nor would an estate in remainder take effect.

The statute provides that no conviction for any offense whatever (except treason) shall work a forfeiture of any goods, chattels or lands, or of any right or interest therein. 2 R. S., 6th ed., § 42. Augustus was a cousin of Charles H., and could not be his heir at law while his brother or sisters are living. Charles H. was entitled to the land upon the death of his mother, and that event having happened it would be in the nature of a forfeiture to deprive him and his heirs of it. To hold otherwise, if Charles H. should be pardoned or escape, marry and have children, neither he, nor his children on his death, would have any interest in the land.

Judgment reversed, and new trial ordered.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur.

## JUSTICE'S COURT. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

George Brisbane, *respl.*, v. The Bank of Bataiva, *applt.*

Decided April, 1885.

Though the amount deposited in a bank, as well as the checks drawn upon and paid by the bank, exceed \$400, these items do not constitute a matter of account between the parties of which a justice court has no jurisdiction, where the only item in dispute is a certain check claimed to have been drawn by the depositor.

Appeal from judgment of county court, reversing judgment of a justice's court.

Action to recover the sum of \$25, a balance alleged to be due plaintiff upon deposits made in defendant's bank. The answer was a general denial, settlement and payment in full. Upon the trial plaintiff testified to having made deposits in various sums with defendant, amounting in the aggregate to \$6,128.50. He also testified to the drawing of checks on the bank in various items amounting to \$5,351.01; but also admitted that they have returned checks to him for the whole fund deposited except the sum of \$25. When plaintiff rested defendant's attorney moved to dismiss the action on the ground that the accounts of both parties proved on the trial exceeded the sum of \$400, and therefore that the justice had no jurisdiction of the case. The motion was granted, and judgment was entered against plaintiff for the costs of the action. Appeal was taken to the county

court, which reversed the judgment.

*George Bowen*, for applt.

*William Tyrell*, for respt.

*Held*, That this was not a case of mutual accounts between the parties, the sum total of the accounts of both exceeding \$400, and therefore not within the jurisdiction of the justice, Code Civ. Pro., § 2863, since defendant had no accounts or claims against plaintiff, but was simply an action to recover a balance claimed to be due and remaining unpaid upon an indebtedness for moneys deposited at divers times with defendant.

The amount deposited in the bank, as well as the checks drawn upon and paid by the bank, largely exceeded \$400; but these items did not constitute an account between the parties in the meaning of the code. When a check drawn upon the bank was presented and paid it extinguished *pro tanto* so much of the demand as was paid, and only the balance remaining unpaid became an account between the parties, and that amount alone can be taken into consideration in determining the question of jurisdiction. Plaintiff conceded that the whole amount had been repaid except a certain sum. That item then became the only amount that can be considered upon the question of jurisdiction. 17 W. Dig., 279; S. C., 13 Abb. N. C., 60; 4 Civil Pro., 311; 47 N. Y., 89-92; 4 Civ. Pro., 227; 15 How., 250; 41 id., 146; 8 id., 263; 1 E. D. Smith, 538; 10 Wend., 557, 537; 52 Barb., 147.

*Gilliland v. Campbell*, 18 How., 177; *Stilwell v. Staples*, 3 Abb.,

365, explained and distinguished as being cases of mutual accounts of both parties against each other.

The claim of plaintiff, by payments conceded to have been made, was reduced down to the amount of \$25; and the only question to be litigated between the parties was as to the payment of that sum on the eleventh day of November, 1877, upon a check drawn by plaintiff. Of this the justice had jurisdiction.

Judgment of county court affirmed.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur, *Corlett, J.*, not sitting.

#### DELIVERY ORDER. VENDOR'S LIEN.

#### N. Y. SUPERIOR COURT. GENERAL TERM.

John U. Anderson, assignee, *respt.*, v. Clement Reed et al., *appls.*

Decided March 3, 1885.

Where the holder of a sold note, being the vendee therein named, makes a delivery order in favor of a third person, which is accepted by the vendor, such third person is entitled to the property referred to in said sold note as therein provided, upon the fulfillment of the conditions of the original contract by the parties thereto. Consequently, if payment was to be made in the vendee's notes, which are duly given and accepted in payment, the holder of such an order is entitled to the property or its value, though the vendee becomes insolvent before the maturity of his said notes. This holds good as to property to be manufactured.

Appeal by defendant from judgment and order denying motion for new trial.

Plaintiff brought this action as

assignee of De Leon, to enforce De Leon's rights under an order for the delivery of goods which has been accepted by defendants. The action was for damages for non-delivery, in the amount of the value of the goods. The jury gave a verdict for this amount.

These are the material facts: Defendants signed an agreement, "We have to-day sold to Messrs. Raisin 1,000 tons of super-phosphates at \$24 a ton on a cash basis, goods to be delivered free on board buyers' vessels and in bulk. Settlements are to be made on delivery to buyers of bills of lading by their notes." This was also signed by the vendees. The Messrs. Raisin had contracted to sell and deliver to De Leon 2,000 tons of phosphates of their own manufacture, and they proposed to De Leon that in the place of the 1,000 tons of the kind to be delivered under their contract, he should accept the 1,000 tons which were to be delivered under defendants' contract. This offer was accepted. Messrs. Raisin told defendants that they had sold to De Leon phosphates that they had not on hand to deliver, and they would have to take the goods under defendants' contract and deliver them to De Leon under his contract. Defendants assented to this. Afterwards the following was presented to them for acceptance:

"December 7, 1881. Messrs. Reed & Co.—Gentlemen: Please deliver to P. M. De Leon 1,000 tons of ammoniated super-phosphates sold to us. R. W. L. Raisin & Co." Upon this order defendants

wrote December 10: "Accepted. Reed & Co." Defendants wrote a note to Messrs. Raisin: "We will deliver to Mr. P. M. De Leon, on your order dated December 7, accepted by us to-day, one cargo, say 500 tons to vessel, to begin loading about the 19th of December, and the remainder of the 1,000 tons to a vessel to load the latter part of December or early in January, 1882; vessels to be furnished by De Leon." Messrs. Raisin took the accepted order and the note, delivered them to De Leon, who thereupon, on December 10, paid the price agreed to be paid by him, under his contract with the Messrs. Raisin. On the same day the Messrs. Raisin delivered to defendants their notes, the agreed price of the goods, under their contract, and defendants accepted them in payment. On December 16 the Messrs. Raisin & Co. became insolvent. Defendants gave notice to all parties that the order and acceptance were void on that ground, also contending that title to the phosphates did not pass, as they were to be manufactured and did not exist at the time of giving the sold note.

*Sullivan & Cromwell and W. J. Curtis*, for appls.

*E. Louis Lane*, for resp't.

*Held*, That the judgment must be sustained. While De Leon was holder of the accepted order the condition upon which defendants were to deliver, namely, payment in the manner provided by the contract, had been performed, so far as contract obligations were concerned. All that was left to the vendors was what may be called a

contingent right to keep possession. The vendor may waive this right, or the facts may show that the special contract excludes it. In this case they have no right to assert it against De Leon. The acceptance was something more than a promise to Raisin & Co., who drew it for the benefit of Raisin & Co. It was made for the benefit also of De Leon. It was intended to become operative when delivered to him. Its form, coupled with the other facts, establishes between defendants and De Leon an immediate relation.

The controlling consideration is that when for sufficient consideration the vendor promised to deliver possession to the sub-vendee, if De Leon may be deemed one, the vendor abandoned the right to withhold delivery that would rest upon the vendee becoming insolvent.

Judgment and order affirmed, with costs.

Opinion by *Sedgwick, Ch.J.*; *Truax, J.*, concurs.

### WARRANTY.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Jehial Hymes, *applt.*, v. William W. Esty et al., *ex'rs*, *respts.*

Decided April, 1885.

The opening of a public street or highway to its legal width, or using it as a street, is not a sufficient eviction to enable the owner to maintain an action against his grantor for breach of a covenant of warranty.

Appeal from order granting motion for a new trial on a case after verdict for plaintiff.

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Defendant's testator on May 1, 1869, conveyed a lot in the village of Ithaca with covenant of warranty to one T., who Aug. 29, 1876, conveyed with covenant of warranty to plaintiff. In 1881 plaintiff enclosed the whole lot, a strip of which, twelve feet in width, the village claimed had long been appropriated for a public street. The village then brought action to restrain him from enclosing or obstructing the street, of which action plaintiff gave defendants notice and asked them to defend, but they did not. He then answered denying the existence of the street. On the trial of that action it was found that prior to 1860 the then owner of the lot dedicated a part of it to the public for the purpose of a street and that the village authorities accepted it, constructed and for twenty-five years prior to 1881 maintained a public street on the land in dispute, and judgment was entered restraining this plaintiff from obstructing the street and for costs.

This action was brought on the covenant of warranty to recover \$250 damages for the eviction and the expenses of defending the former action. The jury rendered a verdict for \$457.24, and subsequently the Special Term, on motion, granted the order appealed from.

*F. E. Tibbetts*, for *applt.*

*Almy & Bouton*, for *respts.*

*Held*, No error. The existence of a public street or highway, legally laid out and openly traveled, upon land conveyed with a covenant of warranty, does not, if the

public have but an easement, amount to a breach of warranty. 15 Johns., 483; 46 Pa., 229. If the soil of a street or highway is appropriated or used for other purposes the owner may maintain trespass or ejectment against the intruder. 1 Burr., 133; 2 Johns., 357; 15 id., 447. In this state, opening a public street or highway to its legal width, or using it as a street, is not deemed a sufficient eviction to enable the owner to maintain an action against his grantor for the breach of a covenant of warranty. Whether the existence of a public street or highway is a breach of a covenant against incumbrances is a question upon which the decision of the various states do not agree. 3 Washb. R. P., 4th ed., 460, 462.

The sole foundation of this action is the judgment in the case of the village of Ithaca against this plaintiff, the judgment roll in which case was introduced in evidence by plaintiff, by which it appears that the land from which plaintiff claims to have been evicted was a legal public street at the date of the grant of defendant's testator to T., and also at the date of the grant of T. to plaintiff. Plaintiff cannot use this judgment as a verity so far as it tends to establish his cause of action and then turn and treat it as a falsity, subject to be contradicted and overthrown by oral evidence, in so far as the findings upon which it rests are found unfavorable. The judgment roll which plaintiff invokes to establish his cause of action destroys it.

Order affirmed, with costs to abide event.

Opinion by *Follett, J.*; *Hardin, P. J.*, concurs; *Boardman, J.*, not voting.

#### CIVIL DAMAGE ACT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Phineas O. Stevens, *applt.*, v. Harrison C. Cheney et al., *respts.*

Decided April, 1885.

A parent of an adult child is not entitled to recover damages for injury to his means of support under the Civil Damage Law in absence of proof that he is a poor person unable by work to maintain himself, and that the child was, before and at the time of the injury, under a legal obligation to support him; and that by reason or in consequence of the child's intoxication his accustomed means of maintenance have been cut off or diminished.

Appeal from judgment entered upon a nonsuit and from order denying motion for a new trial made upon a case and exceptions.

Action to recover damages which plaintiff claimed to have sustained to his means of support by reason of the intoxication of his son Carlton, who was a married man of the age of thirty-one years. He became intoxicated from the liquor sold to him by defendant, and on his way home he was unable to properly care for himself, and in consequence of such intoxication was run over by the cars, making it necessary to amputate both of his legs. Carlton had always lived with plaintiff. Plaintiff testified that his son furnished some of the wood and provisions for the use of the family; that he cut hay, and drove plaintiff

to and from his office prior to the injury; that since then he has not been able to labor, and still continues to live with him. That he owned a house and lot worth about \$350, a horse \$70, a buggy \$30, and a lumber wagon \$18. That he is a justice of the peace, and that his income does not exceed \$250 per annum. It did not appear whether he had any other property, or whether his son owned anything. It was contended that as the son had attained his majority plaintiff had no legal claim to his services, nor was he under any legal obligation to aid in the support of plaintiff, consequently no recovery could be had for injury to means of support.

*Burrell & Robinson, for applt.*

*Eli Soule, for respts.*

*Held,* That in the absence of proof that plaintiff was a poor person who is insane, blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, and that his son was of sufficient ability to relieve and maintain him, Code of Crim. Pro., § 914, the latter was under no legal obligation to support him, and consequently he could not recover damages for injury to his means of support under the statute. Laws 1873, chap. 646. And there being no proof that his son was a poor person and that he became legally chargeable for his support and maintenance, and that the charge brought upon him by his son's injury diminished his means of support so as to render them inadequate therefor, he could not recover on that ground.

The plaintiff must show that he is a poor person unable to maintain himself; that his accustomed means of support have been cut off or curtailed; that he is dependent and helpless, and is not possessed of accumulated capital or property adequate for his maintenance without the aid of his son. 74 N. Y., 526.

If the parent is a poor person within the meaning of the statute, it is the duty of the son to aid in his support, and if he did so voluntarily or otherwise, and the parent has been deprived of it by reason of the intoxication, he is entitled to recover even though the son be over twenty-one years of age. 56 Vt., 410; S. C. 30 Alb. Law J., 370.

We are of opinion that the evidence fails to bring the case within the statute authorizing a recovery for injury to means of support, and that the court properly granted a nonsuit.

Judgment and order affirmed.

Opinion by *Haight, J.*; *Smith, P.J.*, concurs; *Barker, J.*, not voting; *Bradley, J.*, not sitting.

#### SUPPLEMENTARY PROCEEDINGS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Solomon Marx et al., *respts.*, v. Bernard Spaulding et al., *appls.*

Decided March 27, 1885.

The following return to an execution was made by the sheriff:

"In pursuance of the demand of plaintiffs' attorneys, I make the following return to the within execution: I have collected nothing under, and have not found any

personal property out of which the said execution, or any part of the same, can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." *Held*, That no order for the examination of defendant in proceedings supplementary to execution could be based on such return. An order for the examination of a defendant in supplementary proceedings cannot be upheld upon a motion to vacate it for the reason that it is based upon a return to the execution which did not warrant its granting, upon proof that a sufficient return should have been made. The remedy is to require the sheriff to make the proper return and, if he refuses, to move to compel him to do so.

Appeal from order denying motion to vacate order for the examination of defendants in proceedings supplementary to execution.

The motion was made upon the ground that the return of the sheriff to the execution was not such as warranted the granting of the order. The return was in the following form:

"In pursuance of the demand of plaintiffs' attorneys, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same, can be made, but I thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." The motion was opposed upon an affidavit tending to show that the execution should have been returned *nulla bona*.

*A. Thain*, for appls.

*S. Untermeyer*, for respts.

*Held*, That the code does not justify proceedings supplementary to execution where the execution has not been returned for the reason that the sheriff has levied upon and is about to sell real estate of defendant, nor ought the right to the supplementary order to be made to depend upon the result of a controversy upon motion to set it aside upon conflicting affidavits on the question whether the sheriff should not have made the return required by law as the basis of the supplementary examination.

That if the sheriff has not made the proper return the remedy is to require him to do so, and, if he refuses, to move to compel him to make it.

Order reversed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concur.

#### MURDER. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, *respts.*, v. Antonio Rego, *applt.*

Decided May, 1885.

If upon a trial for murder there is evidence, or inferences arising therefrom, which may bring the case within the crime of manslaughter, the question whether the crime was murder or manslaughter should be unequivocally submitted to the jury. Reading the sections defining manslaughter preceded by the remark that the court does not see their applicability to the case is error.

Appeal from judgment convicting defendant of the crime of murder in the first degree.



Defendant was indicted for murder in the first degree, in having stabbed one McG. with a knife, from the effects of which he died. The evidence showed that defendant, deceased and others were dancing and drinking in a grogery. A fight occurred in the street and they all rushed out to witness or join in it. In the course of the fight the blow was given. It appeared that, so far as known, defendant and deceased had never had any previous difficulty or acquaintance.

In the charge the court fully explained to the jury the crime of murder in the first and second degrees. Defendant's counsel requested him to charge that "When death is caused in a cruel and unusual manner and in a heat of passion, the character of the crime depends upon the intent; and where it is done without intent to cause the death it is but manslaughter, and the intent must appear beyond a reasonable doubt." The court responded that it was a good legal proposition, but he did not see its applicability in this case. Defendant's counsel then requested a charge that if the jury found that defendant "was not guilty of murder in the first or second degree, but was guilty of a slight and lesser grade of crime, they can find that under the indictment." The court replied, "The rule of law is, that a party who is indicted for a higher offense may be convicted of any lesser offense that the evidence satisfies the jury he has been guilty of—any lesser offense in the same line of offenses, as in this case,

manslaughter in the first degree." Defendant's counsel then requested the court to charge the jury as to the different grades of manslaughter—what constitutes manslaughter in the different degrees and the penalty connected therewith. The court replied, "I think perhaps I better, rather than to deny that request, although I don't see the applicability," and proceeded to read or state the substance of §§ 189-193 of the Penal Code.

*Oscar J. Brown*, for applt.

*Ceylon H. Lewis*, Dist. Atty., for respts.

*Held*, Error. It was the duty of the court to decide all questions of law which arose on the trial, and instruct the jury within what crime the evidence and inferences which the jury were authorized to draw might bring the case. Code Crim. Pro., § 417; 50 N. Y., 598. The sections of the statute defining manslaughter were either applicable or inapplicable to the case. If there was no evidence, or inferences arising from the evidence, which might bring the case within the crime of manslaughter, it was the right and the duty of the court to so charge. 50 N. Y., 598; 13 Abb., N. S., 370; 18 Hun, 487; 78 N. Y., 492. But if there was evidence, or inferences arising from the evidence, which might bring the case within the crime of manslaughter, it was the duty of the court to so charge and point out the particular facts and states of mind which the jury must find to have existed in order to bring the homicide within the crime of manslaughter. Whart. Crim. Pl., § 709. This the

court failed to do, but instead read the sections defining manslaughter, preceded by the remark that the court did not see the applicability of the sections to the case. It is impossible to say that this direction was harmless to defendant if he was entitled to have this question submitted to the jury; indeed it is almost certain that under such a direction the jury would not consider the case in connection with the crime of manslaughter. 1 Park., 340; 81 N. Y., 360. See also 3 Hun, 357; 60 N. Y., 643.

It is argued that the jury having been properly instructed in respect to the crime of murder, and having found defendant guilty of that crime, they necessarily found that defendant intentionally killed the decedent, and thus passed upon defendant's state of mind and negatived the idea that the crime was manslaughter. Logically this position may be technically correct, but unfortunately jurors do not always reason logically, and in cases of this gravity defendant is entitled, upon his request, to have every material issue which may arise out of the evidence presented to the jury and affirmatively considered by them. 61 Barb., 307; 1 Park., 340.

Without calling attention to the cases of homicide arising out of sudden affrays or mutual combats, and without intimating that the evidence or the inferences to be drawn from it should induce a jury to find as a question of fact a verdict of manslaughter, we are of the opinion that whether the

crime was murder or manslaughter should have been unequivocally submitted to the jury. .

Judgment reversed, and new trial granted.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Merwin, J.*, concur.

#### CONTRACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

William Wilsey, *applt.*, v. John Yourden, *respt.*

Decided April, 1885.

Where the market value of merchandise at the place of delivery is controlled by its market value at a neighboring place, evidence of its value at the latter place is competent in an action upon breach of contract to deliver such merchandise.

Appeal from judgment in favor of defendant for costs, and from order denying motion for new trial on the minutes.

In May, 1881, defendant owned 200 cords of wood piled on the bank of the canal near Boonville, which is about forty miles by canal from Utica, at which place plaintiff resided. Plaintiff purchased the wood for \$660, being at the rate of \$3.30 per cord, to be taken where piled in July or August following, and paid \$10 down. The remainder was to be paid by drafts drawn on plaintiff whenever he chose to draw the wood. Afterward defendant sold and delivered the wood to another purchaser, and this action was brought for damages in justice's court, where plaintiff recovered a verdict for \$150 damages and four dollars costs. On a new trial in County Court a

verdict was rendered for plaintiff for \$10, his motion for a new trial was denied and judgment entered in favor of defendant for costs.

On the trial in County Court the only questions litigated were whether a valid contract of sale was entered into, which was decided in plaintiff's favor, and as to the market value of the wood at the place where piled, which was the place of delivery, defendant claiming that it was worth less than the contract price, and hence that plaintiff sustained no damages.

Plaintiff testified, without objection, to the value of the wood where piled and at Utica, and that the difference in value between those places was the cost of transportation. He also offered to show by one G. the value of the wood at Utica, which was excluded. Later G. was called by defendants and testified on cross-examination, without objection, that "the market price there is governed by the market price here in Utica, and is fixed by freight and wastage."

Defendant and his witness testified that the value of the wood where piled was \$3.25 per cord. On defendant's cross-examination he testified that he knew the cost of transporting wood from his place to Utica, and was then asked what it cost, which was excluded. Defendant was then asked if the market price at his place was governed by the market price at Utica, which was also excluded.

At the close of the evidence the court held that the evidence given by plaintiff as to the value of the wood at Utica was immaterial.

*Henry F. & James Coupe*, for applt.

*Walter Ballou*, for respt.

*Held*, That the appeal book not disclosing the grounds on which the motion for a new trial was made, the appeal therefrom presents no question for review. 34 Hun, 178.

The court erred in excluding the evidence offered. Upon the breach of a contract to deliver merchandise sold, ordinarily the measure of damages is the difference between the contract price and its market value at the time and place it is to be delivered. Usually, when the property sold has a market value at the place at which it is to be delivered, evidence of its market value elsewhere is incompetent. The evidence shows that the market value of the wood at the place at which it was to be delivered was controlled by the market value at Utica. This made the evidence of the market value at Utica competent, and it was error to exclude such evidence; and it was also error to rule that the evidence admitted on that question was immaterial. 66 N. Y., 82; 69 id., 348; 1 Sedg. Dam., 7th ed., 586, note; 2 Whart. Ev., § 1290, and cases cited. It was also error to refuse to permit plaintiff to prove by defendant, upon his cross-examination, that the market value of wood at Utica controlled the market value at his place. The measure of damages was the difference between the contract price and the market value at the place at which it was to be delivered; but the evidence excluded was competent to aid the

jury in fixing the market value at the place of delivery.

Judgment reversed and new trial ordered, with costs to abide event.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

### APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Josephine Myers, *respt.*, v. George S. Riley, *applt.*

Decided April, 1885.

An order of the county court granting or denying a motion for a new trial on the ground of newly discovered evidence rests in the discretion of the court, and is not reviewable by the Supreme Court.

Appeal from judgment entered upon verdict of the county court and from an order denying a motion for a new trial on the ground of surprise and newly discovered evidence.

The action was brought to recover damages for personal injuries sustained by plaintiff in consequence of her stepping into a coal hole in a sidewalk in front of defendant's premises. After verdict rendered for plaintiff and before entry of judgment, defendant moved for a new trial upon the ground of newly discovered evidence, which the county court denied, and judgment was entered upon the verdict. The only point argued was, that the county court erred in not granting the motion for a new trial.

*L. F. & J. E. Durand*, for *applt.*

*Thomas Raines*, for *respt.*

*Held*, That an order granting or refusing a new trial on the ground of surprise and newly discovered evidence lies in the discretion of the court; and that the Supreme Court has no power to review the discretionary orders of the county court.

Appellant contends that the order affects a substantial right and is therefore appealable under § 1342 of the Code. But it appears to be established beyond doubt that a motion of this character is addressed to the discretion of the court. 38 N. Y., 42; 96 id., 635.

Orders of the Special Term, although discretionary, may be reviewed by the General Term, for it is a branch of the same court, and the court may review its own orders. But the county court is a separate and independent tribunal, and it is a fundamental rule governing the review by one tribunal of the proceedings of another, that orders or decisions resting in discretion are not reviewable. 24 N. Y., 635.

It is held that an order of the county court referring an action upon the ground that the trial would involve the examination of a long account is a discretionary order; and it appearing that there was a long account, the order could not be reviewed in this court, for the reason that the decisions of one tribunal resting in discretion are not reviewable by another. 30 Hun, 523. In *Bowen v. Widmer*, 12 W. Dig., 525, the general term of the late fourth department decided that it could not review an order of the county court granting a new

trial upon the ground of newly discovered evidence. See, also, 38 N. Y., 42. In 23 Hun, 91, the court remarked that it could not review orders of the county court which rest solely in the discretion of that court, but that the order there in question did affect a substantial right and was appealable.

Judgment and order affirmed.

Opinion by *Haight, J.*; *Barker, Bradley and Corlett, JJ.*, concur.

### ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Jacob Gladke et al., *respts.*, v. Moses Maschke, *applt.*

Decided March 27, 1885.

An action for damages for the conversion of personal property is within sub. 2 of § 635 of the Code of Civ. Pro., and is one in which plaintiff is entitled to an attachment; and the fact that the same complaint contains a statement of another cause of action, plainly referring to the sale of the same goods, for damages for the sale and delivery of the said goods induced by false and fraudulent representations, will not deprive plaintiff of his right to said attachment.

Appeal from order denying motion to vacate an attachment.

The first cause of action stated in the complaint was for damages sustained by the sale and delivery of goods induced by false and fraudulent representations. The complaint also contained a statement of a second cause of action, plainly relating to the sale of the same goods, alleging them to have been purchased by defendant when he was insolvent and with the intent and design not to pay for them,

and that in pursuance of such design defendant had converted them to his own use.

An attachment was issued in the action, in which the cause of action was stated to have been one for the wrongful conversion of personal property, and by the affidavit on which the attachment was issued a conversion of the goods by defendant was also charged.

A motion was made to vacate the attachment upon the ground that none would lie in an action brought to recover a money judgment only as damages for obtaining goods by false representations, and assuming that one would lie under the second cause of action, still none should have been issued upon it on account of its joinder in the same complaint with a cause of action upon which no attachment could have been granted.

*Alex. Thain*, for applt.

*Jacob Schwartz*, for resp't.

*Held*, That the statement contained in the complaint, inasmuch as the demand was the same which was referred to in the first as it was in the second subdivision of the complaint, presented the case of an action for damages for the conversion of personal property, and, within sub. 2 of § 635 of the Code of Civ. Pro., that entitled plaintiff to an attachment, inasmuch as the other grounds required by the Code for that purpose were established by affidavit. 25 Hun, 395.

*Wittner v. Von Minden*, 27 Hun, 234, criticised.

Order affirmed.

Opinion *per curiam*.

DIVORCE. ALLOWANCE.  
APPEAL.

N. Y. SUPERIOR COURT. GENERAL  
TERM.

Carrie Uhlman, *respt.*, v. Simon  
Uhlman, *applt.*

Decided March 2, 1885.

In an action for divorce, the court in exercising its discretion in granting an allowance should consider that in the end the party directed to pay money may be in the right, and should provide as far as possible for such a contingency. It should ascertain what has been and will be the *quantum* and kind of litigation sufficient for the proper investigation of the issues. Where an allowance is asked for two counsel, the necessity for two counsel must affirmatively appear.

Modification of order as to amount does not necessarily carry a right to direction for repayment of excess.

Compliance with an absolute direction to pay is not taking a benefit under the order so as to prevent an appeal.

Appeal by defendant from order granting plaintiff an allowance of \$2,750 for counsel fees and expenses; and motion to dismiss the appeal.

The action was for divorce, and the allowance was made to two counsel. Payment was made by defendant as directed by the order.

*Wetmore & Jenner*, for *applt.*

*R. S. Newcombe* and *Chauncey S. Truax*, for *respt.*

*Held*, That when it clearly appears that a party has no case or no defense, a court may, in its discretion, refuse to make an allowance. When this does not clearly appear, the discretion of the court should consider that in the end the party directed to pay money may be shown to be in the right, and should provide, as far as possible,

for such a contingency. In so providing it should find what has been and what will be the *quantum* and kind of litigation sufficient for the proper investigation of the issues. All cases should have regard to public policy. Each case makes a certain sort of precedent, and such precedent should be used in the light of the policy. The plaintiff was bound to show affirmatively why the employment of two counsel was necessary. One of them was the plaintiff's attorney. As attorney he would not be entitled, except under special conditions, to such an amount as one-half of the allowance would be. As counsel there was not shown to be any necessity for another. The same is true of the associate counsel. Either of those gentlemen was fully able to conduct the litigation singly. No greater allowance should have been made for services rendered up to July, 1884, than \$1,500.

*Further held*, That the mere modification of the order does not give the defendant a right to a direction that plaintiff repay the excess. To give the defendant a right to restitution, by order or by action, if indeed there is a right of restitution, depends upon facts outside of this record that will have to be considered with it, should any demand for restitution be made. The same may be said of a suggestion that the order should be so modified as to apply the excess to compensation for services after July, 1884. The mere fact of payment under the order does not necessarily result in the defendant

having no substantial interest in a modification by the reduction of the amount.

The payment by defendant was made the ground of a motion to dismiss the appeal, on the ground that he thereby gained leave to compel plaintiff to proceed in the action, and for himself to proceed.

*Held*, That the direction for payment was unconditional. If there had been no further proceedings payment could have been enforced. The allowance regarded past proceedings. The right to proceed and to compel plaintiff were the consequences of the payment and formed no condition of the order to pay.

Motion to dismiss appeal denied, without costs. Order modified by reducing the amount of the allowance for expenses to \$1,500, and as so modified, affirmed, without costs.

Opinion by *Sedgwick, Ch. J.*; *O'Gorman, J.*, concurs.

### ELECTION OF REMEDIES.

N. Y. SUPERIOR COURT. GENERAL TERM.

James M. Seymour, *respt.*, v. Pierre Lorillard, *applt.*

Decided March 2, 1885.

Whether a party should be compelled to elect to proceed upon one of two causes of action stated in the complaint rests in the discretion of the court, where it has such power.

A cause of action for false representations and a cause of action for breach of warranty, both concerning the same matters, are separate and independent though under the allegations of the complaint containing them but one recovery can be

had. In this case the court refused to compel the plaintiff to elect which of the above actions he would proceed upon.

Appeal from order denying motion that plaintiff be compelled to elect one of the causes of action alleged in the complaint. The first cause of action was for damages from false representations, viz., that a certain yacht then offered for sale by defendant to plaintiff did not leak and was sound and in perfect condition. The second was for damages from a breach of a warranty upon the sale of the yacht, viz., defendant falsely warranted said yacht not to leak, and to be sound and in perfect condition.

*John E. Parsons*, for *applt.*

*Roger A. Pryor*, for *respt.*

*Held*, That whether a party should be compelled to elect to proceed upon one of two causes of action stated in the complaint rests in the discretion of the court in a case where the court has power to compel an election. If in this case the plaintiff has not improperly joined two causes of action, so that the complaint is not demurrable, the merits of both may be definitely determined in this action. If the complaint be demurrable, defendant should go at once to the specific remedy pointed out by the Code; or again, if he do not demur, the issues upon the whole of the complaint may be tried, reserving an opinion, however, as to the power of the judge at the trial to compel an election based upon the appearance then of facts which cannot now be perceived from the pleadings only.

This is not an instance of an endeavor to state the same cause of action in two forms. There are two causes of action that are not inconsistent. The fact, if it be a fact, that the plaintiff can recover according to the allegations of the complaint but one sum of money under either cause of action or under both does not and should not deprive the plaintiff of both methods of attaining his rights. The question is, whether in the plaintiff's using both at one time, or in one proceeding, he will embarrass the defendant in his defense to either or to both, when no such consequence would follow and no embarrassment of plaintiff's legal remedy would happen if he were obliged to bring two actions. The only way in which the defendant could be harmed, if at all, would arise from the plaintiff endeavoring to show that the defendant was guilty of a fraud as well as of breach of contract, and thus the jurors receive an unfavorable impression which might affect their verdict. In the present case it has little force, for practically all the facts would be in evidence under either cause of action.

Order affirmed, with \$10 costs and disbursements.

Opinion *per curiam*; *Sedgwick, Ch. J.*, and *Truax, J.*, sitting.

#### APPEAL.

N. Y. COURT OF APPEALS.

Zoeller, *applt.*, v. Riley, sheriff, *respt.*

Decided March 24, 1885.

In an action not founded on contract the

sum for which the complaint demands judgment is to be deemed the amount of the matter in controversy within § 191 of the Code.

This was a motion to dismiss the appeal in the above entitled action on the ground that the amount in controversy is less than \$500. It appeared that said action was brought to recover of defendant, as sheriff, the value of a laundaleet alleged in the complaint to be worth \$500, for which amount judgment was asked. Plaintiff was the only witness sworn on the trial, and he testified that said vehicle was worth \$300.

*Morris & Pearsall*, for motion.

*A. H. Dailey*, opposed.

*Held*, That the action not being founded on contract, the sum for which the complaint demands judgment is deemed to be the amount of the matter in controversy within the meaning of section 191 of the Code. If plaintiff succeeds upon his appeal, on a new trial it will be open to him to show that the carriage was worth \$500 or more.

Motion denied.

*Per curiam* opinion. All concur.

#### PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Daniel B. Childs et al., *respts.*, v. George J. Seabury, *impl'd.*, *applt.*

Decided March 4, 1885.

C. & H. became special partners with S. & P. in a firm which had previously been composed of the latter alone, upon the



agreement that S. & P. would assume and pay all the existing indebtedness of the old firm. S. & P. failed to perform this agreement, but used the capital contributed by C. & H. to the new firm to discharge the indebtedness of the old firm. The new firm subsequently failed in business and compromised with its creditors, and thereafter C. & H. brought an action to recover the amount of capital contributed by them, less the amounts which they had drawn from the firm, as damages for the breach of the above mentioned agreement. *Held*, That in the absence of any evidence showing that the failure of the new firm was the result of the misappropriation of the capital contributed by the plaintiffs the action could not be maintained.

Appeal from a judgment entered on the report of a referee.

In 1871 the defendants were co-partners, under the firm name of Seabury & Porter, engaged in carrying on a drug business, and in April of that year they formed a limited co-partnership with the plaintiffs as special partners, and by the terms of the articles of co-partnership then entered into the defendants agreed to assume, pay and discharge all the existing indebtedness of the firm of Seabury & Porter. They did not do so, however, but used the capital furnished by the plaintiffs for the new firm for the payment of the debts and liabilities of the old. In 1872 the new firm became insolvent, and made a general assignment for the benefit of its creditors, and subsequently compounded with them for 25 per cent. of their claims. Thereafter this action was commenced by plaintiffs to recover the amount of the capital contributed by them to the new firm, less the amounts received by them from said firm, as

damages for the breach of the agreement on the part of defendants to assume and pay the debts of the old firm.

It did not appear that the failure of the new firm was due in any way to the misappropriation of the capital contributed by plaintiffs.

*Roger A. Pryor*, for applt.

*William G. Choate*, for respts.

*Held*, That plaintiffs when they invested their money in the limited copartnership took the risks of the chances or contingencies of trade, and could not expect to have it repaid unless the business in which they had invested it was sufficiently successful to provide for it.

That, in the absence of proof that the firm failed in consequence of the misappropriation by defendants of the capital contributed by plaintiffs, the inference must be that disaster arose from circumstances not unusual in commercial life which occasion loss even when the business is conducted with seeming judgment and skill, and that therefore plaintiffs did not appear to have suffered any wrong and were not entitled to succeed.

Judgment reversed, and new trial ordered.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

#### WILLS. TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Robert Willets et al., exrs.,  
*applts.*, v. Sarah A. Willets et al.,  
*respts.*

Decided March 4, 1885.

The will of the testator contained the fol-

lowing clause: "I do give and bequeath to my son, R. W., my friends, W. H. M. and C. G., and my nephews, J. T. W., R. R. W., and E. B. W., and my son-in-law E. M., the survivor and survivors of them, the sum of \$100,000, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or, in case any of my descendants should become poor and needy, then to apply in whole or in part to such descendants." *Held*, That there was no attempt to create an unauthorized trust, but that the gift was an absolute one and the provision of the will was valid.

Appeal from judgment of the Special Term adjudging a provision of the will of Samuel Willets, deceased, to be invalid, as being an attempt to create a trust not authorized by the laws of the State. The provision in question was as follows:

"I do give and bequeath to my son, R. W., my friends, W. H. M. and C. G., and my nephews, J. T. W., R. R. W., and E. B. W., and my son-in-law, E. M., the survivor and survivors of them, the sum of \$100,000, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or, in case any of my descendants should become poor and needy, then to apply, in whole or in part, to such descendant."

*Wilson M. Powell, P. J. Fuller and Wm. G. Hoes*, for appls.

*H. D. F. Weekes and George H. Foster*, for respts.

*Held*, That the words of the gift in the provision in question were clear and positive, and that the words, "survivor and survivors of them," referred to the death of the testator. 25 Wend., 119; 2 Hun, 531; 2 Redf. on Wills, 488.

That the gift, therefore, was one to the individuals named, or such of them as should survive the testator, of the whole sum in equal shares.

That plain words of gift are not to be cut down by implications which do not arise from necessary construction, 1 N. Y. Sup. Ct. Rep. 211, and that the words of gift in this case were followed by language simply descriptive of the motive that inspired the gift. That the word "relying" was only an utterance of confidence. That it was not an imperative expression, and did not impose any obligation or create any trust. 1 Jarman on Wills, 5 Am. Ed., 385-693; Story's Eq. Jur., 1069; 39 Hun, 126; 1 Simcox, 534; id., 542; 9 id., 319; 10 Eq. Cas. 267; 18 Beav., 372; 5 Mad. Ch., 434; 14 Simmons, 379; 3 Irish Eq., 629; 114 Mass., 66; 17 Johns., 281; 90 Conn., 342; 82 N. Y., 405; 14 W. Dig., 206; 5 Irish Eq., 373; Eng. L. R. 8 Ch. Div., 542; 2 Sim., N. S., 267; 81 N. Y., 359; 91 id., 465; 2 Redf. on Wills, 422, 423; Tiffany & Bullard on Trusts, 224, 225; Lewin on Trusts, 2 Am. Ed., 174; 20 Pa., 268.

33 N. Y., 97; 34 id., 584; 2 T. & C., 344; 95 N. Y., 76; id., 403, 420, distinguished.

That the gift was a valid one adopted, as to its form, by the

testator as a means to an end not unlawful, and therefore not void.

Judgment reversed.

Opinion by *Davis, P.J.*; *Brady, J.*, concurs.

### EXTRA ALLOWANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Wm. Gibson Jones, *applt.*, v. Ward H. Wakefield, *respt.*

Decided March 27, 1885.

A motion for an additional allowance cannot be granted after the adjustment of the costs of the action and the effect of such adjustment is not changed in any manner by the fact that other costs awarded on an application to open a default are still to be adjusted.

Appeal from order making an additional allowance.

The costs of the action had been adjusted previous to the making of the motion for an additional allowance, and it was claimed by appellant that defendant was therefore precluded by rule 44 of the general rules of practice from making this motion. On the other hand it was claimed by respondent that the said rule did not apply, inasmuch as the costs taxed were not *final* costs, certain costs awarded on an application to open the default still remaining to be adjusted.

*John E. McIntyre*, for *applt.*

*Wm. W. Badger*, for *respt.*

*Held*, That the costs in the action having been adjusted defendant was precluded by the express language of rule 44 from moving for or obtaining an additional allowance, and that the fact that

other costs awarded on an application to open a default might be recovered by defendant did not, in any manner, change the effect of this adjustment.

Order reversed and motion denied.

Opinion *per curiam*.

### HUSBAND AND WIFE. PLEADINGS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Christian Muller, *respt.*, v. Wilhelmina Muller, *applt.*

Decided March 27, 1885.

A husband cannot allege, as a ground for annulling his marriage, that his wife made false representations to him whereby he was induced to marry her when he otherwise would not have done so, when, during cohabitation, he discovered the falsity of such representation but yet continued to cohabit with her for two years after such discovery.

A plaintiff will not be allowed to amend his complaint by setting up facts of which he had knowledge at the time of the commencement of the action.

The court will not, as a general thing, undertake to determine upon an application for leave to amend a pleading whether the proposed amendment can be finally substantiated by proof or not; but when it is made to appear without contradiction that the amendment cannot be sustained by evidence it should not be permitted to be made.

Appeal from order allowing plaintiff to serve an amended complaint.

This action was brought to obtain a judgment declaring plaintiff's marriage with defendant null and void because of the fact that she had another husband living at the time of such marriage. It was

afterwards discovered that the person with whom she was alleged to have contracted this preceding marriage had a wife living at the time of the solemnization of that marriage with him and that such marriage was void on account of that circumstance. Plaintiff after ascertaining that fact, applied for leave to amend his complaint by alleging that defendant had fraudulently represented to him prior to the time of his intermarriage with her that she was the widow of one M., and that she had not since his decease remarried with any other person, when she had in fact remarried after the death of M. with the person named in the original complaint, and by that false representation he was induced to marry her when he otherwise would not have done so.

It was shown without contradiction by the affidavits read on behalf of defendant upon the motion for leave to amend that plaintiff was informed of this intermediate marriage while he and defendant were living together as husband and wife, and that thereafter he continued to live with her for two years.

*Simon Sultan*, for applt.

*Henry C. Botty*, for respt.

*Held*, That this subsequent cohabitation deprived him of the right to complain that he had been defrauded by the misrepresentations made by defendant and for that reason that his marriage with her should be annulled.

That when this action was commenced by plaintiff he knew that this alleged misrepresentation had

been made, and if he could have relied upon it as a legal ground for annulling his marriage with defendant he should then have alleged them in his complaint, and his failure to do that presented a legal answer to the application made for leave to amend his complaint as that was provided for and allowed by the order. 30 Hun, 573.

That it is true as a general proposition that the court will not undertake to determine whether the amendment proposed to be made to a pleading can be finally substantiated by proof or not, but when the fact is made to appear without contradiction, as it was by the affidavits read upon the motion in this case, that the amendment cannot be sustained by evidence, there it should not be permitted to be made.

Order reversed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

#### SUPPLEMENTARY PROCEEDINGS.

##### N. Y. COURT OF APPEALS.

*Buchanan, respt., v. Hunt.*  
*applt.*

Decided April 14, 1885.

The court has no power to order the judgment debtor to pay over to the receiver money received and retained by him in another state or due to him there; the most that can be done is to require him to transfer his title to the money to the receiver.

On Feb. 16, 1884, plaintiff procured and served an order for the examination of defendant in sup-

plementary proceedings. The examination disclosed that defendant was employed by the Erie R. Co. as agent at Hawley, Pennsylvania; that he was unmarried; that he drew his wages and retained them at Hawley; that about \$30 of wages up to Feb. 16, 1884, was due him, and that a receiver of his property had not been appointed. Plaintiff moved for an order directing the judgment debtor to pay over the money in his possession to a sheriff to be designated, and also that his employer pay to such sheriff the money due said judgment debtor from it up to Feb. 16, 1884. This motion was granted.

*Lewis E. Carr*, for applt.

*John W. Lyon*, for respt.

*Held*, Error; that the court had no power to compel defendant to go out of this State to obtain and bring here the money directed by the order to be delivered to the sheriff. The most that could be done was to require defendant to transfer his title to the money to a receiver, in order that he might pursue it in Pennsylvania.

Order of General Term, affirming order of County Judge granting motion, reversed.

Opinion by *Rapallo, J.* All concur.

#### NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*John Steffan, respt.*, v. *The City of Buffalo, applt.*

Decided April, 1885.

In an action for injuries resulting from a defective sidewalk, the court charged the  
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jury that they were to presume defendant knew of the defect if sufficient time had elapsed for it to gain that knowledge.  
*Held*, Error.

Whether admission of evidence of number and ages of plaintiff's children should be treated as error which might prejudice defendant and require the granting of a new trial, *quære*.

Appeal from judgment on verdict at County Court.

Action for personal injuries to plaintiff while walking on a defective sidewalk which it was defendant's duty to keep in repair. The walk was constructed by a contractor some weeks before the injury. Evidence was given as to its condition, and as to whether the defect was such as would be discovered by a casual observer passing over it, or whether by ordinary inspection the defect would be ascertained. The court charged the jury that they were to presume that defendant had knowledge of the defect if a sufficient time had elapsed for it to gain the knowledge, for it was their duty to obtain such knowledge.

*Charles W. Goodyear*, for applt.

*Giles E. Stilwell*, for respt.

*Held*, Error. If the defect were such that by the exercise of reasonable diligence it would have been disclosed, the jury might find defendant chargeable with notice. 36 Barb., 226; 45 N. Y., 136; 61 id., 506; 91 id., 137. But the question of notice to charge defendant was one of fact for the jury, dependent on all the circumstances. When a defect has become notorious and remains so for such length of time as may be deemed reasonable for the author-

ities to observe and repair it there may be an imputation of notice and negligence which the law might recognize; but when there is a question whether it has become such, that of notice arising from lapse of time embraces other considerations which call upon the jury to find the fact of notice and negligence. 61 N. Y., 510 affirming 61 Barb., 580. The charge unduly retrenched the inquiry of the jury and embraced in a legal proposition what should have been left to them to presume or find as matter of fact. The jury were possibly misled.

The evidence admitted as to the number and ages of plaintiff's children was immaterial for any purpose, but whether it can be said to have influenced the verdict so that it should be treated as error which might prejudice defendant and require the granting of a new trial we do not at this time determine. A like question has been given importance in Penn. RR. Co., v. Books, 57 Penn. St. Rep., 339; Baldwin v. West. RR. Co., 4 Gray, 333.

Judgment reversed, and new trial granted, costs to abide event.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

### WILLS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Leslie C. Wead, general guardian, et al., *appls.*, v. William P. Cantwell, ex'r, et al., *respts.*

Decided May, 1885.

An action for the construction of a will cannot be supported unless it appear that there is an actual disagreement between the plaintiff and the executors as to the provisions of the will, the true meaning of which is necessary to the present direction and action of the executor or trustee. The court will not anticipate difficulties nor decide upon the construction of remainders, etc., which may never take effect, especially not where the will is clear as to the present duty of the trustee or executor.

This action was brought by the general guardian of an infant and by the infant by her guardian *ad litem* against the executor of a will and another for the construction of said will. The testatrix, Mrs. Horton, after a bequest of \$5,000 to her husband (who died soon after her), devised by the third clause the residue of her estate, real and personal, to her executors in trust for Carrie, an infant, her only child, for life. The will then, by the fourth clause, provided that if the daughter died leaving issue all the real and personal property should go to such issue, share and share alike, if all her "children shall then be living, or if none of them shall have died at the time of my death," but that if any had died leaving issue such issue should take the share the parent would have taken "if living at the time of my death." The will then provided, by the fifth clause, that if the daughter died without issue the executors should turn the estate into money, hold it as trustees, pay the income of \$5,000 "for the relief of poor and destitute persons residing in Malone village;" and, by the sixth clause, expend the residue for the benefit of the First Congregational Society

of the town of Malone in such manner as they deem best. A power of sale was given the executors by the seventh clause. The defendant executor is now sole executor. The Congregational church is also defendant. On demurrer the complaint was dismissed.

*Leslie W. Russell*, for appls.

*Joseph R. Flanders*, for respts.

*Held*, That plaintiffs had not made out a case. The complaint avers that the will is doubtful and uncertain; that various clauses are in derogation of the statutes; that the bequest to the poor of Malone is invalid, and that more than three-fourths of the estate is given the First church. But the complaint does not aver that there is any doubt or disagreement between the infant and the executor as to the trust for her life. It is said that there is no direction as to the disposition of the excess of income which will accrue during the infant's minority. The trust is for life, and is in the ordinary form as to infant's minority, 72 N. Y., 376, and if there are accumulations of income during her minority she will take them at majority. 92 N. Y., 508; 95 id., 13.

In the fourth clause the words living at the time of "my death," probably should be "her death." But whatever the meaning, the infant has no interest in their construction. That clause only disposes of a remainder after the infant's death. Furthermore, the persons who will take that remainder are not now in existence. Difficulties should not be anticipated.

If the infant leaves children liv-

ing at her death, no question will arise over the words "my death."

The bequest to the poor of Malone may be void, but the condition upon which it is given may never arise. So it is claimed that, as to one-half of the bequest to the First church, it is void under Ch. 369, Laws of 1860. Still at this time it cannot be determined whether the one-half of the remainder in the estate after the trust for the infant's life will prove at her death to be undisposed of or not. If she shall leave children living at her death, clauses five and six do not take effect. No action in the matter is at present called for upon the part of the executor.

The guardian of the infant should not have been a party plaintiff. He has nothing to do with the matter. The guardian *ad litem* only should bring the action. Costs below were given out of the income and profits of the real and personal property held by the executor in trust for the infant. This was wrong, we think, and see 2 R. S. m. p., 730, § 63.

Costs should be paid by plaintiffs; with this modification, judgment affirmed, with costs.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Wallace H. Webster et al., *respts.*,  
v. Michael T. Scanlon, *applt.*

Decided May, 1885.

M. owned a wagon and thereafter borrowed another of plaintiffs. The latter wagon he took apart and had removed, without plaintiff's knowledge, to the barn of B. The latter wagon being levied upon as the property of M., defendant, hearing that it belonged to plaintiffs, made inquiry as to this of one of them, who replied that they did not own it. In an action by plaintiffs for a conversion, *Held*, That plaintiffs were not estopped, unless the jury found that the plaintiff inquired of knew or ought to have known from his conversation with defendant that the wagon inquired about belonged to plaintiffs.

Action for the conversion of a wagon which belonged to plaintiffs. Defendant bought it upon a sale, which sale was upon an execution in an action by defendant and one Fleming against one Millett. The sale was at the barn of one Beman. Millett also owned a wagon. He borrowed the one in question of plaintiffs. After using it he took it apart and stored it in his own barn; afterward he had it removed to the Beman barn. Plaintiffs did not know of the removal. When the levy was made Millett told the constable that the wagon belonged to plaintiffs. Defendant directed that inquiry should be made of plaintiffs, and himself saw one of them. One of the plaintiffs, Edwin Webster (being in ignorance of the removal), said they did not own any wagon at Beman's barn. Plaintiffs had a verdict. The court charged that plaintiffs were not estopped, unless Edwin Webster knew or ought to have known from the conversation with defendant that it was plaintiff's wagon which was levied on; and that plaintiffs were not estopped by Edwin Webster's state-

ments made in ignorance of the fact that the levy was on plaintiffs' property.

*Walter J. Mears*, for applt.

*Burke & Kilburn*, for respts.

*Held*, That the charge was correct. Plaintiffs were not called upon to go to the Beman barn and examine the wagon to see if it was theirs. They answered the questions truthfully as they understood the matter. The case is different from one where a forged note is presented to the supposed maker and he admits the signature to be genuine. There the party estopped has at hand all the means to determine accurately what the truth is. Here it was properly left with the jury to say whether Edwin Webster knew or *ought to have known* that it was the wagon of the Websters about which defendant was inquiring. There was clearly a misunderstanding.

Judgment affirmed, with costs.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs; *Bockes, J.*, not acting.

#### CHATTEL MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Elizabeth M. Filkins, respt., v. Thomas Cruice, applt.*

Decided April, 1885.

A chattel mortgage given to indemnify a surety upon an undertaking in an action against loss or damage, and conditioned that it should be void when the mortgagor should pay the damages, etc., that should be adjudged against him, and providing that the mortgagee, "if he should deem himself in danger of losing the said debt, by delaying the collection thereof until the expiration of the time limited for the



payment thereof," might take possession, etc., authorizes the mortgagee in taking possession before any liability upon the undertaking has accrued.

In the absence of any finding of fact tending to show that the mortgagee did not act in good faith in making the seizure, or that he did not in fact deem himself in danger of loss, a finding of the court that the seizure and detention was wrongful is unwarranted, and especially so when inconsistent with the facts found.

Appeal from judgment entered upon report of referee.

Action was brought for the recovery of the possession of eight mules and harness, alleged to have been wrongfully seized and detained by defendant.

The referee found as facts, that in May, 1875, defendant became surety for plaintiff in an action of replevin brought against her, and as indemnity to the plaintiff in that case against loss or damage, plaintiff in this case delivered to defendant her chattel mortgage upon fifty-two mules and harness, conditioned that it should be void in case the mortgagor should pay the damages, etc., in an action brought by H. Walcott against her, and indemnify and save harmless defendant in this action from all damages, etc., by reason of signing the undertaking; that the mortgagee was authorized, "if he should deem himself in danger of losing the said debt, or any part thereof, by delaying the collection thereof until the expiration of the time above limited for the payment thereof, to take possession of the chattels before or after the expiration of the time aforesaid, and sell the same," etc.

That in September, 1875, defend-

ant seized eight mules and harness, and continued to hold the same at the time this suit was brought. That the causes of the seizure as stated by defendant were, substantially, first, that he felt himself in danger of loss or damage by reason of becoming surety; second, that he had been requested to make the seizure by plaintiff's husband and agent, who told him that the mules were scattered along the line of the canal and were in danger of being seized for their keeping; that the action of replevin in which the undertaking signed by defendant was given was ultimately settled by the parties thereto, and this defendant was thereby discharged from his liability without having incurred any loss or damage as such surety. As a conclusion of law the referee found that the seizure and detention of the mules by defendant was wrongful, and that plaintiff was entitled to judgment.

Defendant testified that plaintiff's husband told him that the mules were being held along the canal for their board, and urged him to seize the mules. Filkins testified that he was the husband and agent of plaintiff in the matter, and did not contradict defendant as to this conversation.

*David F. Day*, for applt.

*George M. Osgoodby*, for resp't.

*Held*, That as there is no finding of any fact tending to show that defendant did not act in good faith in making the seizure, or that he did not deem himself in danger of loss, the legal conclusion is erroneous.

See *Allen v. Vose*, 20 W. Dig., 74; S. C. in full, 31 Alb. Law J. 46; *Jones on Chattel Mortg.*, § 431; *Thomas on Mortg.*, 443.

If the grounds upon which defendant made his seizure as stated by the referee were true in fact, then it appears affirmatively that he acted in good faith and had good reason to believe himself in danger of loss; and this is also shown by the testimony. If defendant in good faith seized the property, at the time believing himself to be in danger of loss, then his detention would be lawful until the action in which he had become surety was settled. The referee fails to find that the demand for the mules was made after the settlement of the case, or that the settlement took place before the commencement of this action. There is, therefore, no finding of fact that justifies the conclusion that the detention of the property was wrongful.

Judgment reversed, and new trial ordered before another referee.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur.

#### PARTNERSHIP. SLANDER. ABATEMENT.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

*Frederick A. Shale et al., v. Henry Schantz.*

Decided April, 1885.

The death of one partner does not abate an action of slander originally brought in the name of all the partners.

Motion by plaintiff for new trial

on exceptions taken at Circuit, ordered heard at General Term in first instance.

The action was begun by A., B. and C., who were partners. The cause of action alleged is slander relating to and affecting the financial condition and credit of plaintiffs as a firm. After issue joined C. died, which fact appearing at the trial the complaint was dismissed, on the ground that the cause of action abated on and by reason of the death of one of the plaintiffs.

*Thomas Raines*, for plff.

*James Breck Perkins*, for defts.

*Held*, Error. The complaint charges a cause of action which properly joined the partners as plaintiffs. 3 Bos. & Pul., 150; 3 C. & P., 196; 8 N. Y., 452. If the action had been brought by a sole plaintiff who had died during pendency and before verdict the action would have then abated. Whether C.'s death produced the same practical effect as the death of a sole plaintiff would, is a novel question, but we answer it in the negative, on principles deemed applicable to the nature of a partnership and the relation of the surviving members of it. Practically, the dissolution of a partnership by the death of a partner has relation only to subsequent business transactions to a qualified extent. The relation of the survivors to the situation in which the death of the member left the property and business enables them respectively to manage and control the partnership affairs as fully as before, until all things necessary to winding them

up are accomplished. Collyer on Part., §§ 118, 546; 3 W. & S., 345; 38 Am. Dec., 768; 6 Cow., 441; 24 N. Y., 570; 4 De G., M. & G., 542; 24 N. Y., 574. The joint relation of the survivors is not broken into a tenancy in common by such death, nor are their relation and equities impaired by it. 27 N. H., 289; 59 Am. Dec., 376; 88 N. Y., 600. See Collyer on Part., § 764; 13 Metc., 132; 88 N. Y., 604. In the prosecution of this action the survivors are exercising no new or derived powers and asserting no new or additional rights. 27 N. H., 289. It is in equity only that an entity of a partnership distinct from its members is recognized. 1 Story Eq. Jur., § 680; 50 Vt., 668; 20 N. J. Eq. (5 C. E. Gr.) 172; 18 N. Y., 77.

The entire cause of action is in the surviving plaintiffs because it was in the firm; there has been no demise requiring revival of the action, but they are the beneficial parties plaintiff, and the action proceeds for their benefit. Code Civ. Pro., § 758. See 13 N. Y., 322.

Dyckman v. Allen, 2 How., 17, distinguished.

The action is still pending. New trial granted, costs to abide event.

Opinion by *Bradley, J.*; *Haight* and *Childs, JJ.*, concur.

#### EXECUTION. PENSION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

James A. Stockwell, receiver, *applt.*, v. The National Bank of Malone et al., *respts.*

Decided May, 1885.

Pension money received in the form of a draft and deposited in a savings bank is exempt from execution under Code Civ. Pro., § 1393. The interest earned by such deposit is also exempt.

Defendant Rowell was granted a pension by the United States government for his services as a private soldier in the War of the Rebellion. He received a draft from the pension agent which he endorsed and delivered to the National Bank of Malone, the other defendant. He also delivered to the bank \$100 in cash, pension moneys. He never had actual possession of said \$1,000, except as above stated. The action is by a receiver in supplementary proceedings to reach these moneys. The complaint was dismissed.

*Beman & Munsill*, for *applt.*

*Hobbs & Kilburn*, for *respts.*

*Held*, That the moneys were exempt under Code Civ. Pro., § 1393. It did not cease to be a pension because deposited in a savings bank on interest. 7 Lans., 106. Its identity is not lost because Rowell is now a creditor of the bank. The section is not intended to prevent the pensioner from using the money, and if the question was before us we should be disposed to hold that everything bought in the ordinary way with this money would also be exempt. The fact that the pensioner never had the actual possession of the money, that is, that he endorsed the draft and deposited it, can make no difference. That is the ordinary manner in which business is done. See, as to the exemption, 18 W. Dig., 355.

Judgment affirmed, with costs.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs; *Bockes, J.*, doubts.

### EVIDENCE. WITNESS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*In re* probate of the last will and testament of Charlotte D. Hewitt.

Decided April, 1885.

As the wife of a contestant of a will, who is also an heir at law of the decedent, would become vested with an inchoate right of dower in the lands of the decedent if the will should be declared void and refused probate, she is interested in the event of the proceeding, and so disqualified, under § 829 of the Code, from testifying as to personal transactions or communications with the deceased, for the purpose of showing her mental and physical condition: and this, although both are legatees under the will.

Appeal by the executor from decree of surrogate's court refusing probate of the last will and testament of Charlotte D. Hewitt, deceased. Probate was refused upon the sole ground that the decedent was not of sound mind and memory at the time of executing said will.

Melinda Hewitt was sworn as a witness on behalf of the contestants, and testified that she was the wife of Jefferson Hewitt. It previously appeared that Jefferson Hewitt was an heir at law of the deceased and one of the contestants, and that she left both real and personal estate. The witness and her husband were legatees under the will to the extent of \$50 each. The following questions and answers were put and given, subject to exceptions taken by respondent's counsel mainly upon the

ground that the witness, as the wife of an heir at law contesting the will, was interested in the event of the action, and was incompetent under § 829 of the Code. "Q. How, besides from what you saw, did you learn her condition; from seeing her did you obtain the knowledge? A. From herself. Q. What did you learn from her in regard to her condition? A. I used to hear her say that she was discouraged and didn't think she would be well again; I heard her say she paid out large sums for medicine and for doctors' bills. Q. Did what you saw and heard that night from her impress you as being rational or irrational? A. Rational. I had a conversation with her, it might have been an hour after; when I went there no one was present. Q. What was the conversation? A. She said that she had been advised to make her will, and told that it would not shorten her days."

*F. D. Wright*, for proponent and applt.

*Tabor & Storke*, for contestants and respts.

*Held*, That as the witness was the wife of a contestant of the will who was also an heir at law of the decedent, and would become vested with an inchoate right of dower in the real estate of the decedent if the will should be declared void, she was interested in the event of the proceeding, and so disqualified, under § 829 of the Code, from testifying as to personal transactions or communications with the deceased. 30 Hun, 555.

The evidence was material and

bore directly upon the main question submitted to the surrogate for determination, and must be presumed to have influenced his judgment in its determination.

Decree reversed, and the issue ordered to be tried before a jury at the circuit, with costs of this appeal to abide the final award of costs in the proceedings.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur.

### ATTORNEYS.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re* application of M. to compel C., an attorney, to pay over moneys.

Decided May, 1885.

M., having moneys to invest, gave them, as alleged, to C., an attorney, for that purpose, who, on demand, failed to account for them. M. then began an action in which the attorney was arrested. The action is pending. Upon a separate application to the court for an order directing the attorney to pay over these same moneys, *Held*, That the matter was discretionary, and as an action was pending the order should be refused.

C., an attorney, had collected moneys for M. He paid them over to her. Soon after she returned them to him for investment. He lent them to his father, then supposed to be a rich man. The father became insolvent. C. subsequently gave M. his note for the moneys, which M. stated in her affidavit was not taken nor to be taken as a payment. She commenced an action in which C. was arrested and gave bail. That action has been pending for some time. C. is

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said to be worthless. Upon an order to show cause this proceeding was taken in the nature of a contempt for an order that C. pay these moneys to M. At Special Term the motion was denied.

*E. T. Brackett*, for applt.

*Theodore B. Gates*, for respt.

*Held*, That the order was properly refused. We are not prepared to decide whether proceedings of this character can be taken against an attorney to recover moneys which he has received simply for the purpose of investment. However this may be, we regard the pending action as a matter which should be considered by the court. Perhaps it cannot be strictly called a bar, as the word "bar" is one which applies to actions, and this is a proceeding. But we think a man should not be harassed by two actions or proceedings arising out of the same transaction, especially where an order of arrest has issued.

Order affirmed.

Opinion by *Learned, P.J.*; *Bockes, J.*, concurs.

### GUARDIAN AND WARD.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William O. Douglass, *respt.*, v. Edwin B. Low, guardian, *applt.*

Decided May, 1885.

Where one who had just become of age was induced by fraud to allow a person in collusion with his guardian to appear for him in a Surrogate's Court upon the settlement of the guardian's accounts, and a decree was thereafter entered discharging the guardian, *Held*, that this decree was,

under the circumstances, no defense to the guardian in an action by the ward to set aside a fraudulent transfer made to him by the guardian about the time of the decree.

To the complaint in this action defendant demurred. The facts admitted by the demurrer were that defendant was plaintiff's general guardian until he became of age in March, 1879; that in May, 1879, defendant told plaintiff that he held as guardian \$4,300; that about this time he gave plaintiff a note and mortgage of one Low, his brother, for \$3,200, dated March, 1879, payable to plaintiff in two years, the lands mortgaged being in Illinois; that Low was then indebted to defendant and was insolvent; that defendant falsely represented the lands as improved, and relying on this plaintiff accepted the note and mortgage as payment for \$3,200; that the representations were wilfully false; that plaintiff discovered the truth in Nov., 1880, and demanded the cancelling of his receipt given to defendant; that defendant assented and promised to pay plaintiff, and that plaintiff is willing and offers to assign to defendant the note and mortgage; that at the time he took the note and mortgage plaintiff was induced to sign a release and also an authority to one Ross to appear for him in a Surrogate's Court upon defendant's application to be discharged as guardian; that in Jan., 1880, without notice to plaintiff, Ross and defendant appeared in said court and defendant was discharged. The demurrer was overruled.

*Waldo & Grover*, for applt.

*Palmer, Weed, Kellogg & Smith*, for resp't.

*Held*, That the complaint was good. It is said by defendant that after he comes of age a ward may settle with his guardian. 6 Johns. Ch., 242. All that case decides is that a release given six months after a ward comes of age, freely and without fraud, is valid. Here the fraud is admitted. Further in equity was to allow a ward one year to investigate his guardian's accounts. 2 Vesey, 548; 7 Paige, 46.

It is also urged that the decree in the Surrogate's Court, which stands, protects the guardian. We think this a case where equity will set aside a decree. 70 N. Y., 8. There was no trial before the surrogate, and by fraud plaintiff was induced to consent to a decree without a trial. This is like a case where the unsuccessful party has been prevented from fully exhibiting his case by fraud, by reason of which there has never been a real contest before the court on the subject matter of the suit. 98 U. S., 61; 30 Alb. L. J., 373.

Judgment affirmed, with costs.

Opinions by *Learned, P.J.*, and *Bockes, J.*

#### EVIDENCE. PRACTICE.

N Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Edward P. Alexander, resp't., v. Henry R. Osborn, appl't.*

Decided April, 1885.

To cure the error of admitting illegal evidence upon a trial, the evidence should be stricken out and the jury distinctly instructed to disregard it.

Appeal from judgment for plaintiff, entered on verdict, and from order denying motion for a new trial.

Action to recover the value of a horse alleged to belong to plaintiff and wrongfully sold and converted by defendant.

Special damages for the value of the use of the horse were demanded in the complaint. Defendant hired the horse of plaintiff in June, 1880, and sold him about July 2, 1880. With intent to increase the amount of his recovery plaintiff asked this question: "What was the rental value of the horse from the 8th of June until the 1st of November," which question was objected to as incompetent under the pleadings and not the proper measure of damages. The objection was overruled and plaintiff answered, "The horse was worth seventy-five cents a day to me through the summer months from the 1st of June to the 1st of November over and above his keeping."

*James E. McCabe*, for respt.

*Lindsley & Dunmore*, for applt.

*Held*, Error. The rule of damages in such cases is the value of the property with interest thereon from the time of the conversion. 56 N. Y., 623. No motion was afterwards made to strike out this illegal evidence, nor was the jury instructed directly to disregard it. But without alluding to this evidence the court in charging the jury instructed it correctly as to the rule of damages and further said that plaintiff could not in any event recover for the hire of the

horse or for anything except the value of the horse and interest from July 2d, 1880. Did such instructions cure the error? We are compelled to say it did not. Upon the authority of 19 N. Y., 299; 47 id., 186, 187, 188; 63 id., 143; 85 id., 76; id., 90; 55 id., 408. The neglect to strike out the testimony and distinctly direct the jury to disregard it leaves the jurors to accept of such evidence as properly in the case and having weight in their deliberations. For this error the judgment and order appealed from must be reversed, and a new trial granted, costs to abide the event.

Opinion by *Boardman, J.*; *Hardin, P.J.*, concurs; *Follett, J.*, concurs in result.

#### WILLS. DEEDS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Mehitabel G. Crain, *respt.*, v. John Wright, *applt.*

Decided April, 1885.

A devise of a parcel of testator's farm to his widow, "to have and to hold for her benefit and support," and "all the remainder of my property" to his son, gives the widow an estate in fee; the intent to give a less estate not appearing by express terms nor being necessarily implied in the terms of the devise. "The remainder of my property" refers not to the devise of a remainder in fee, but rather to all the property not included in the devise to the widow.

Where a deed is handed to a party to be delivered to the grantee at a future time, whether it is to be considered as the deed of the grantor presently, or as an escrow, depends upon the intention of the parties, to be gathered from the words used and the purposes expressed. If the future delivery is to depend upon the perform-

ance of some condition, it will be deemed an escrow; but if it is merely to wait the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently.

So held where a deed to plaintiff was delivered to her husband, to be kept secret during the grantor's life, and after her death to be delivered to plaintiff.

Appeal from judgment entered upon verdict, and from order denying motion for new trial made upon the minutes.

Action to recover possession of lands. In 1854 John Wright died seized of the lands in question, leaving a will devising the same in these words: "Unto my dear wife Anna I give and bequeath fifty acres of land off the north end of my farm, to have and to hold for her benefit and support; and I also give to her all my household furniture, beds and bedding. Unto my son, John Wright, Jr., I give and bequeath all the remainder of my property, after paying the following legacies:"

Defendant, John Wright, Jr., entered into possession of the whole farm and occupied the same. The widow conveyed a portion of the said fifty acres to plaintiff before her decease in 1873. The main question was whether the widow took the fee or only a life estate. Defendant contended that the words "to have and to hold for her benefit and support" limited the devise to an estate for life.

*George C. Greene*, for applt.

*Richard Crowley*, for respt.

*Held*, That the intent to pass a less estate than a fee does not appear by express terms, nor is such an intent necessarily implied in the

terms of the devise; and that, therefore, the widow took the fee. 1. R. S., 748, § 1.

Though the word "support" might be held to limit the estate to one for life, yet the word "benefit" is sufficiently broad and comprehensive to embrace every use to which the devisee may devote the land, and to enlarge the estate into a fee. This view of the devise appears to be supported by the case of *Campbell v. Beaumont*, 91 N. Y., 464.

Again, it appears to have been the testator's intention to dispose of all his property, but if the estate devised to the widow should be held to be for life only no disposition is made of the remainder in fee, which would descend to the heirs-at-law. The devise of "the remainder of my property" refers, not to the devise of a remainder in fee after the termination of a life estate, but rather to all the property not included in the devise to the widow. If an estate in remainder was intended to be created, those words are not sufficient for that purpose. As it was the apparent intention of the testator to dispose of all his property, both real and personal, in order to give effect thereto the widow must be held to take an estate in fee.

It was contended that the deed from Anna Wright, the widow, to plaintiff was never delivered so as to vest the title in her. It appeared that after she executed the deeds, they were left lying upon the table at plaintiff's house; that she then took them up and handed them to plaintiff's husband, saying that she



wanted he should take care of them, and she didn't want them exposed during her lifetime, for the reason that her first will had got out and made a fuss, and on that account she didn't want the deeds to get out and make another fuss; that she wanted no one to know it except those who were obliged to know it; that after her death she wanted Mehitabel (the plaintiff), to have hers, and Francis his. Plaintiff's husband took the deeds to his attorney and left them in his custody; and after the death of Mrs. Wright Francis' deed was sent to him, and plaintiff's deed was put on record. The court submitted to the jury the question whether it was the intention of Mrs. Wright, at the time she handed the deeds to plaintiff's husband, to have them take effect as a present disposition of the property, or to operate as a testamentary disposition after her death. The jury found in favor of plaintiff.

*Held*, That the finding of the jury was correct. Where a deed is handed to a stranger to be delivered to the grantee at a future time, whether it is to be considered as the deed of the grantor presently, or as an escrow, depends upon the intent of the parties, to be gathered from the words used and the purposes expressed. If the future delivery is to depend upon the performance of some condition, it will be deemed an escrow; but if it is merely to wait the lapse of time or the happening of some contingency, and not the performance of a condition, it will be deemed the grantor's deed presently. In this

case, no condition was attached to the delivery of the deed; the only request made was that it should not be exposed during her lifetime. See 34 N. Y., 92-105; 2 Hill, 641; 13 Johns., 285; 17 Barb., 25; 4 Day, 66; 2 Mass., 447; 5 Conn., 317.

Judgment and order affirmed.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur.

### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Augusta A. Knight, *respt.*, v. The President & Trustees of Bath-on-the-Hudson, *applt.*

Decided May, 1885.

Plaintiff, holding in her arms a large washstand, crossed a street in the defendant village, not upon the crosswalk, and about dusk. *Held*, That it was not negligence as matter of law for plaintiff to cross at a point where there was no crosswalk, although there was a suitable crosswalk within twenty feet, and that the question whether it was negligence for plaintiff to cross with a piece of furniture in her arms, which might obstruct her view of the hole into which she fell, was one for the jury.

The action was to recover for injuries sustained by falling into a hole on White street. The accident happened about dusk. The question of contributory negligence was raised. Plaintiff had a verdict.

*Van Alstyne & Hevenor*, for *appls.*

*Charles E. Patterson*, for *respt.*

*Held*, That it was not negligence as matter of law to cross the street where there was no crosswalk when there was a suitable crosswalk very near. 90 N. Y., 679.

As to the article of furniture carried, persons have a right to carry things in the street. And the question whether the thing carried is so large as to make it imprudent for the person to carry it unaided is plainly one for the jury.

Judgment and order affirmed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

### RAILROAD. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Wm. H. Van Ostran, by guard'n,  
v. The N. Y. C. & H. R. RR. Co.

Decided April, 1885.

When defendant's train stopped at plaintiff's destination, the platform of the car plaintiff was in stopped in the middle of a street. There was nothing to direct passengers to alight from one side rather than from the other; but there was a branch track running along one side. Plaintiff alighted on the latter side, and was injured by a train running on the side track. *Held*, That a verdict in plaintiff's favor for his injuries should be sustained.

Motion by defendant for new trial on exceptions at circuit.

Action for personal injuries to plaintiff, alleged to have resulted from defendant's negligence.

Plaintiff was 16 years old. He was a passenger on defendant's train from Canandaigua to Auburn. He had never been to Auburn before, and one object of his visit was to see the State prison. He was in the rear car of the train, which, exclusive of engine and tender, was from 280 to 340 feet long. The railroad at Auburn runs easterly and westerly, with

the station on the south, extending from State to Chappell streets, the centers of which streets were 298 feet apart. The train stopped with the rear end of the last car near the centre of State street. North of the track was a side track on which stood another train headed westerly, its engine being east of the rear end of plaintiff's train. Plaintiff alighted on the north side, seeing the prison on that side, and he was walking away when the engine of the train on the side track moving westerly struck him, crushing his foot. There was no platform or anything in the street indicating that there was any preference of sides to alight from. Both sides of the platform of the car were open and furnished with steps. It was customary for the train on the side track to pass westerly on the arrival of the east bound train without waiting for passengers to alight from the latter, because they usually got off on the south side. Plaintiff could have seen the approaching train had he looked to the east as he got off.

*W. H. Adams*, for deft.

*John D. Teller*, for plff.

*Held*, That defendant was negligent in not informing plaintiff in any way that he should depart to the south and in exposing him to danger from the other train before he had reasonable time to cross the side track. 39 How., 407; 17 Hun, 395, Affd., 78 N. Y., 338; 84 id., 241.

Plaintiff had the right to assume that defendant would not expose him to danger while departing

from the train; and the question whether he was negligent in not looking to the east was for the jury. 39 How., 407; 1 Keyes, 23; 1 Abb. Ct. App. Dec., 504; 11 Hun, 333; 17 id., 395, *affd.*, 78 N. Y., 338; 84 id., 241; 66 Barb., 437; 73 N. Y., 595; 88 id., 203; 13 Hun, 589, *affd.*, 75 N. Y., 605; 76 id., 325. The fact that hackmen were on the south side of the track ready to take passengers would not necessarily inform plaintiff, had he seen them, that he should get off on that side. He wanted no hack. Nor was he required to delay getting off until others did to follow them. There is evidence tending to prove that he was one of the first out and off the car, and he testified that he met a person coming up the steps as he was going down.

*Michell v. C. & G. T. Ry. Co.*, 12 Am. & Eng. RR. Cases, 163; *M. C. RR. Co. v. Coleman*, 28 Mich., 440; *P. RR. Co. v. Zebe*, 33 Penn. St. 318; 37 id., 420; *Bancroft v. B. & W. RR. Co.*, 97 Mass., 275, and *Wheelwright v. B. & A. RR. Co.*, 135 id., 225, distinguished.

The relation of passenger continues until one has reasonable opportunity to leave the train and roadway of the company after the train reaches the station to which he is entitled to be carried. 8 Allen, 227.

*Siner v. G. W. Ry. Co.*, L. R., 3 Exch., 150; 4 id., 117, distinguished.

There was some evidence tending to prove that the train had come to a full stop before plain-

tiff got off, and some that he alighted when it was in motion. In his charge on that point the judge said, among other things, "If you find that he did step off while the cars were in motion and that stepping off contributed to the injury, that becomes a most important and probably the decisive question in the case." Defendant excepted "to the charge upon the subject of the negligence of the plaintiff in alighting from the car while it was in motion." It may be questionable whether the exception was not too broad and insufficiently specified to raise the question designed by counsel. 14 N. Y., 310; 40 id., 556; 47 id., 570; 77 id., 495. The last part of the charge upon that subject defendant's counsel would not deem objectionable.

When a passenger voluntarily leaves a train while in motion he ceases to be a passenger, and cannot assume that his safety will be guarded by the company in so far as to enable him to neglect to use active means of precaution. 129 Mass., 500. But the negligence of a plaintiff which will defeat a recovery by him must contribute proximately to the injury. And in this respect the rule is the same as that applicable to the negligence required to charge a defendant. *Cooley on Torts*, 679; 24 Vt., 487, 58 Am. Dec., 191; 111 Mass., 136; 118 id., 251; 6 Hill, 522; 55 N. Y., 608; 60 id., 133; id., 198. The question was for the jury to say whether any negligence on plaintiff's part contributed to the injury; and it was fairly submitted to

them. See 56 N. Y., 302 ; 16 Gray, 501 ; 6 Am. & Eng. RR. Cas., 379 ; 69 N. Y., 195 ; 49 id., 47 ; 17 Hun, 400, *affd.*, 78 N. Y., 338 ; 66 Barb., 438, *affd.*, 64 N. Y., 635.

Motion denied and judgment ordered on verdict.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

### APPEAL.

#### N. Y. COURT OF APPEALS.

The Ansonia Brass and Copper Co., *applt.*, v. Connor et al., ex'rs, *respts.*

Decided April 14, 1885.

Where the Court of Common Pleas has affirmed a judgment of the City Court and judgment has been entered on its remittitur, an appeal to the Court of Appeals must be taken from the judgment rendered by the Common Pleas, and not from the judgment as entered.

Sections 3194, 3195 of the Code do not authorize an appeal to the Court of Appeals from a judgment of the City Court entered upon a remittitur.

A judgment was rendered in the above entitled action in favor of defendants by the City Court (late the Marine Court) of the City of New York, and affirmed by the General Term of the City Court. On appeal to the Court of Common Pleas the judgment was affirmed and leave granted to plaintiff to appeal to this court from the judgment to be entered on the decision of the Court of Common Pleas. An order of affirmance was entered in the Court of Common Pleas, and afterward, on June 3, 1884, a judgment was entered in the City Court reciting that a remittitur had been sent down from the Court

of Common Pleas, and making the judgment of that court the judgment of the City Court. Plaintiff thereupon served notice of appeal to this court "from the judgment entered in the office of the clerk of the City Court" in this action June 3, 1884, no reference being made in the notice to the judgment or order of the Court of Common Pleas. The respondents claim that no appeal lies to this court from a judgment of the City Court, and that the appeal should have been from the determination of the Court of Common Pleas at General Term.

*Marshall P. Stafford*, for *applt.*

*Henry Thompson*, for *respts.*

*Held*, That the appeal should have been in form from the judgment rendered by the Court of Common Pleas, there being no authority in the code to appeal to this court from a judgment of the Marine or City Court. The judgment reviewable in this case is that set forth in the remittitur sent down to the City Court.

The provision of § 3194 of the Code, requiring that the judgment or order of the appellate court be remitted to the court below to be enforced, and the provision of § 3195 which directs that on an appeal to the Court of Appeals the notice of appeal and undertaking must be filed with the clerk of the Marine Court, who must transmit the necessary papers to the Court of Appeals, are not sufficient to establish that the appeal should be taken from the judgment of the Marine Court entered upon the remittitur. If the appeal could properly be taken from that judgment,

the direction to file the notice, etc., in the office of the clerk of the Marine Court would not be necessary, for the general provision would apply that notice of appeal must be served upon the clerk with whom the judgment appealed from is entered by filing it in his office. § 1300. The special direction to file the notice in the office of the clerk of the Marine Court is given for the reason that the appeal is not to be taken from the judgment entered in his office, though he has the custody of the record.

Appeal dismissed.

Opinion by *Rapallo, J.* All concur, except *Andrews* and *Earl, JJ.*, dissenting.

## BANKS. LIMITATION.

### N. Y. COURT OF APPEALS.

Ganley,, adm'r, *respt.*, v. The Troy City National Bank, *applt.*

Decided March 24, 1885.

In 1865 Margaret Ganley deposited two Treasury notes with defendant for safe keeping, and took from its cashier a paper stating that they were to be delivered to her on surrender of the receipt. In 1866 her husband, without her knowledge or subsequent ratification, induced defendant, without producing the receipt, to sell the notes and pay over the proceeds to him, and purchased real estate therewith. She died in 1869, and no administrator was appointed until plaintiff was in 1879. The husband died in 1874. Plaintiff produced the receipt, and demanded of defendant the notes, which were refused. He then began this action. *Held*, That the action was not barred by the Statute of Limitations; that the statute began to run from the time of the demand, and not from that of the sale; that the fact that the husband, if living, would be entitled to a portion of the recovery is no defense, and that plaintiff, as administrator. Vol. 21—No. 18b.

tor, was not obliged to resort to the real estate.

Affirming S. C., 20 W. Dig., 541.

This action was brought to recover damages for the breach of a contract alleged to have been entered into by defendant with G., plaintiff's intestate. It appeared that on April 3, 1865, G. left with defendant for safe keeping two U. S. 7-30 Treasury notes of \$500 each, and took a receipt therefor, which stated that they were "to be delivered on the surrender of this receipt." These notes, by their terms, matured August 15, 1866. On that day defendant, upon the request of G.'s husband, sold the notes, and on August 17 paid him \$1,050, the proceeds of the sale. It appeared that G. was married prior to 1848. About the date G.'s husband received the proceeds of the sale from the bank he purchased a lot for \$1,200, on which he erected a house, and on October 2, 1866, he and his wife executed a mortgage for \$2,000, and one for \$1,000 on the property, which mortgages were discharged of record in 1873. G. continued to live in the house with her husband and children until January 6, 1869, when she died intestate, leaving no property except this claim against defendant, she never having carried on any separate trade or business. Her husband and his children continued to live in the house until April 6, 1874, when he died intestate, and the real estate was inherited by his children. In 1879 the receipt given by defendant was found, and soon thereafter plaintiff, a son of G., demanded of de-

fendant the notes described in said receipt, offering to surrender the same, and upon a refusal to deliver them brought this action.

*R. A. Parmenter*, for applt.

*Edgar L. Fursman*, for resp't.

*Held*, Plaintiff was entitled to recover; that the action was not barred by the Statute of Limitations, as the statute commenced to run from the date of the demand and refusal, and not from that of the sale; that as G. had possession of the notes and delivered them to defendant as owner, and defendant dealt with her as owner, and as there was no proof that they belonged to her husband, or came to her in such a manner as would vest the title to them in him, it must be inferred they were her separate property, and it cannot be held that her husband had the right to control them; that at the time of G.'s death the claim she held against defendant did not, as in common law, pass to her husband, but he was only entitled to his distributive share therein. Laws of 1867, Ch. 782, § 11.

*Also held*, That the fact that G.'s husband, if living, would in case of recovery have been entitled to a portion of the money is no defense to this action.

*Also held*, That plaintiff, representing both the creditors and next of kin of G., was not obliged to resort to the real estate purchased by her husband for indemnity for the wrong done by the conversion of the notes, but could enforce this claim against defendant for the purpose of administering upon the estate of the intestate.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur.

## CONTRACT. EVIDENCE.

N. Y. COURT OF APPEALS.

*Eighmie, resp't., v. Taylor.*  
adm'r., *applt.*

Decided March 3, 1885.

Where the writings executed by the respective parties read together contain a definite agreement of bargain and sale, and lack no element of an entire contract, evidence of an oral warranty by the seller is not admissible.

This action was brought to recover damages for a breach of warranty alleged to have been made by C., defendant's intestate, on the sale of a one-half interest in a lease of certain oil lands, in the tools and fixtures used in working certain wells on said lands, and in the oil stored thereon. It appeared that C. contracted to sell said interest to plaintiff, and to receive in payment therefor a mortgage for \$6,000. A conveyance was executed and delivered by C. to plaintiff, which recited that he sold his interest in said property to plaintiff, and that plaintiff agreed to assume and perform all the covenants and conditions contained in the lease and to release C. from any and all liabilities therefrom, and to assume any and all debts and liabilities of any nature whatsoever then existing against C. by reason of his interest in said lease or in working said wells. The deed also stated that it was the intent that C. should convey to

plaintiff "all his right and interest in and to said lease, business and fixtures," and that said plaintiff in accepting the same shall release C. "of and from all liability arising therefrom, he himself assuming the same." Plaintiff assigned a bond and mortgage for \$6,000 to C., with a guaranty of payment, and C. executed to plaintiff an assignment of the interest which had accrued at the time of the assignment as soon as it was collected. Plaintiff was allowed to prove under objection and exception that C. represented and warranted orally that the wells were yielding sixteen barrels of oil per day and enough gas to supply the engines with necessary fuel; that oil was then worth \$4 per barrel; that the machinery, tools and fixtures were of the latest and most approved patterns and in good condition, and that the debts and liabilities did not exceed \$1,000.

*Samuel Hand*, for applt.

*I. H. Maynard*, for resp't.

*Held*, That the writings must be read together and treated as a single instrument; that so read they contain a definite agreement of bargain and sale and lacked no element of an entire contract, exhausting the final intentions of both parties, and must be conclusively presumed to contain the whole contract as made, and evidence therefore of C.'s oral warranty was improperly received. 1 Johns., 413, 467.

*Unger v. Jacobs*, 7 Hun, 220; *Morgan v. Smith*, id., 244; *Witbeck v. Wayne*, 16 N.Y., 532; *Rozier v. B., N. Y. & P. RR. Co.*, 15 W. Dig.,

99; *Brewers' F. Ins. Co. v. Burger*, 10 Hun, 56; *Wheeler v. Billings*, 38 N. Y., 263; *Chapin v. Dobson*, 78 id., 74; *Jeffrey v. Walton*, 1 Starkie, 385; *Batterman v. Pierce*, 3 Hill, 171; *Erschine v. Adrian*, L. R., 8 Ch. App., 756; *Morgan v. Griffith*, L. R., 6 Exch., 90, distinguished.

The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions; if upon inspection and study the writings, read in the light of surrounding circumstances in order to a proper understanding and interpretation of them, appear to contain the engagements of the parties, and to define the object and measure the extent of such engagements, they constitute the contract between them, and are presumed to contain the whole thereof. 24 N. Y., 338.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed.

Opinion by *Finch, J.* All concur.

#### REAL ESTATE. ADMINISTRATOR'S SALE. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Charles Jenkins v. John Young et al.*

Decided April, 1885.

An administrator sold his intestate's land to pay debts. The petition omitted the name of one of the intestate's heirs, but the proceedings were otherwise regular. *Held*, That the omitted heir was not di-

vested of his title, and he is not barred by the five years' statute of limitations from recovering his share in the lands sold.

Motion by plaintiff for new trial on exceptions at circuit ordered heard at General Term in first instance.

Ejectment. In September, 1863, one J. died intestate seized of certain premises, and leaving plaintiff and four others his heirs at law. In October, 1871, the land was sold pursuant to surrogate's order for payment of intestate's debts. The petition instituting the proceedings for sale was made by the administrator, and omitted plaintiff's name. The statutory notice was in no manner given to plaintiff. The proceedings otherwise complied with the statute. Defendant's title depends upon that sale. Plaintiff claims one-fifth part of the premises as heir of J. The requisite publication of the notice of sale was made. The trial court directed verdict for defendant.

*J. L. Lynn*, for plff.

*E. W. Gardner*, for deft.

*Held*, That the omission of plaintiff's name was a jurisdictional defect. 2 R. S., 100, § 2. The sale did not divest plaintiff of his title, and he was entitled to recover, unless by statute the defect was obviated or his remedy defeated. 33 Barb., 176; 81 N. Y., 109.

The provision of Laws of 1850, Ch. 82, § 2, does not include the omission of a necessary party to the proceeding whose title is to be divested by the sale. No one can be deprived of his property without due process of law. Const., Art. I, § 6. That includes oppor-

tunity to be heard afforded by notice. 35 N. Y., 302; 45 id., 356; 48 id., 313; 20 Hun, 462. The necessity of making plaintiff a party and giving him statutory notice cannot be obviated by statute. 42 Barb., 636; 70 N. Y., 228; 15 Wend., 374; 1 Hill, 130. The administrator cannot be treated as representing the heirs; he represents creditors, in hostility to the heirs. 2 N. Y., 459.

Laws of 1872, Ch. 92, § 1, amending Laws of 1850, Ch. 82, § 3, was intended to relieve the defect in publication of notice of sale and make it effectual after five years, when it had in fact been published for six weeks successively, although less than 42 days had intervened between the first publication and the sale. It would be unreasonable to give the statute construction or effect beyond that of obviating the defective publication of sale so as to deny remedy based upon that after the prescribed time. It does not overcome essential jurisdictional omissions which substantially affect and defeat opportunity of those interested to be heard.

In the affidavit made in March, 1871, of service of citation to show cause why an administrator should not be appointed, it was stated that "it was reported that the said Charles Jenkins was dead by his friends, and that his last place of residence could not be ascertained." This was not enough to permit the presumption of his death in the present proceeding.

Motion granted, costs to abide event.



Opinion by *Bradley, J.; Barker*  
and *Corlett, JJ.*, concur.

WILLS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

Elizabeth Cornue, *applt.*, v.  
Robert H. Webb et al., *respts.*

Decided April, 1885.

Certain terms of a will held to indicate an  
intention on testator's part to charge the  
payment of legacies upon real estate.

Appeal from judgment on decis-  
ion at Special Term, dismissing  
complaint.

Action to have certain legacies  
declared liens on land. W. died,  
leaving a will, by the first clause  
of which he provided for his wife  
during life; by the second clause  
he gave to his daughters E. \$500,  
S. \$300, to his son J. \$500, and to  
his grandson his watch; and the  
third clause was as follows:  
"Third. I give, devise and be-  
queath to my son Robert H. Webb  
the use of all the rest and remain-  
der of my real and personal estate  
not herein otherwise provided for  
and disposed of, of which I shall  
die seized, during his natural life,  
and in case he dies leaving heirs of  
his body, the remainder after his  
decease to such heir or heirs in fee  
forever, but in case of his death  
leaving no heirs of his body him  
surviving, in this case the remain-  
dershall be equally divided between  
all my grandchildren surviving my  
son Robert H. Webb, each to share  
and share alike. And I hereby  
will and direct that my executors  
hereinafter named shall, for the  
purpose of carrying the provisions

of the last above clause, immedi-  
ately after my decease cause to be  
made a true and perfect inventory  
and appraisal of all the real and  
personal estate of which I shall  
die seized and shall thereon file  
the same in the office of the Surro-  
gate of Steuben County, and the  
sum or amount of said appraisal  
(after deducting therefrom the  
amount paid upon debts against  
my estate and the above named  
bequests) shall be the sum to be  
distributed among my said grand-  
children from the estate of my said  
son Robert upon his decease with-  
out leaving issue." Defendants  
Serles were appointed executors  
and letters were issued to them.  
Plaintiff is one of the legatees, and  
having taken an assignment from  
her brother J. of his legacy, she  
brings this action to have the  
legacies made a charge on testa-  
tor's real estate. Testator had not  
sufficient personal estate at the  
time of making the will to pay the  
legacies, and he had less when he  
died, and his condition was such  
meanwhile that it cannot be pre-  
sumed he had any expectation of  
increasing his personal estate.  
The legacies were the only provis-  
ion made for the three children  
named, who, with Robert, were  
his only children living. There is  
nothing to indicate that they were  
not equally in his estimation and  
in fact worthy objects of his boun-  
ty.

*T. F. Parkhurst*, for *applt.*

*C. F. Kingsley*, for *respts.*

*Held*, That the legacies cannot  
be treated as charges on the real  
estate unless it appears that testa-

tor's intention was to make them such. Appropriate extraneous circumstances may be considered in construing the will in that respect. It must be assumed that when he made his will testator intended that the legacies should be fully paid. 72 N. Y., 322; 85 id., 147; 91 id., 614. But that does not allow the conclusion that real estate should be charged, unless it reasonably appears that he then was fairly required to and therefore did know that the personal property would at his death be insufficient, or unless such intent is found in the provisions of the will. The doctrine in this state is, that the residuary clause alone affords no evidence of intention to charge real estate with a pecuniary legacy. 2 Johns. Ch., 614; 47 Barb., 264; 51 How., 260; 16 N. Y., 257; 42 id., 531. But the courts have distinguished some cases where the residuary clause follows the specific pecuniary bequests alone and without any specific devise of real estate, and have applied the reason that the testator must have intended to pass by it less than the whole as its terms indicate, and therefore his intention was to charge his real as well as personal estate with the legacies. 38 Barb., 80; 20 Hun, 282; 30 id., 171; 4 Russ., 376; L. R., 3 Ch. Div., 630., 18 Moak, 734; L. R., 5 Ch. Div., 504, 22 Moak, 254. The residuary clause is held to mean under some circumstances more than a mere intent of the testator not to die intestate. 85 N. Y., 142; 91 id., 605. See 15 Barb., 503; 38 id., 80; 42 id., 43; 8 Abb. N. C., 123; 27

Hun, 335, *affd.*, 91 N. Y., 605. It may be that under all the circumstances such significance might be given to the residuary devise and bequest as to permit the inference of testator's intention to embrace within the latter only what remained after payment of the legacies, and so to charge them upon his entire property unless something appears in the will to interrupt such inference. But that question need not be decided. As we read the will it fairly and unmistakably indicates testator's intent to charge his estate both real and personal with the payment of the legacies.

The executors should be required to account and pay over what, if any, funds they have in aid of the payment of the legacies in question.

Judgment reversed and new trial granted, costs of appeal to abide final award of costs.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

#### FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Margaret Barry v. The Prescott Ins. Co.*

Decided April, 1885.

A fire insurance policy contained a provision that if the premises should "become vacant or unoccupied" etc., the policy should be void. About a month before the fire the premises were vacated by a tenant, and the assured prepared to occupy them, making repairs and moving in her furniture; but at the time of the fire she had not gone into the house to

stay and no one was living in it. *Held*, that the policy was avoided.

Motion by plaintiff for new trial on exceptions at Circuit ordered heard at General Term in first instance.

Defendant insured plaintiff against loss by fire on a dwelling occupied by her and a tenant, and on furniture, etc. The policy contained a provision that if the premises should "become vacant or unoccupied and so remain with the knowledge of the assured, without notice to and consent of this company in writing \* \* \* this policy shall be void." The building and contents were destroyed by fire. During the term of the policy plaintiff moved out of the house and rented it; the tenant moved out before the expiration of his lease, and shortly afterward and about a month before the fire plaintiff took from him the key of the house and went to it, and began moving her furniture into it with a view to occupying it, and three days before the fire her furniture was all moved in, but at the time of the fire she had not gone into the house to stay, and no one was living there and no one had lived there after the tenant left, but plaintiff had been engaged every day for two weeks preceding the fire in having the house plastered, etc., preparatory to her going into it to live. The trial court directed a verdict for defendant on the ground that the condition as to occupancy was broken.

*John Gillette, Jr.*, for plff.

*A. H. Sawyer*, for deft.

*Held*, That the assured is entitled to as favorable a construction of the language of the policy as it will fairly admit of. 32 N. Y., 405; 47 id., 597. The term "unoccupied" as applied to a dwelling house is not in this state an open question, and the house in this case was within that term. 85 N. Y., 162; 5 T. & C., 619; 112 Mass., 422, 17 Am. R., 117; 122 Mass., 298; 70 Mo., 610, 35 Am. R., 438; 52 Iowa, 457; 90 Penn. St. Rep., 277, 35 Am. R., 656.

*Whitney v. Ins. Co.*, 72 N. Y., 117; *Herman v. Ins. Co.*, 81 id., 184, distinguished.

It cannot be said that the month's vacancy was contemplated by the parties to the contract. That length of time could not reasonably be required for a change of occupants. 13 Hun, 371; 52 Iowa, 457; *Bennett v. Ins. Co.*, 50 Conn. The preparations for occupation of the house cannot be deemed occupancy. 10 Allen, 228; 136 Mass., 491.

*Ins. Co. v. Myers*, 63 Ind., 238, distinguished.

There were no questions for the jury.

Motion denied, and judgment ordered on verdict.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

#### PROMISSORY NOTE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*John G. Robinson, applt.*, v. *Peter B. Mernaugh et al., respts.*

Decided April, 1885.

It is competent to show that a surety signed a promissory note upon condition that the payee of the note should furnish the principal maker with work to pay the note and that as fast as the money was earned it should be endorsed on the note.

Appeal from judgment of County Court, affirming judgment rendered in a justice's court on a verdict for defendant.

Action upon a promissory note signed by two defendants. The answer alleges (1st) payment, (2d) counter-claim for work and labor done for plaintiff. Defendant Hendricks was called as a witness and testified to his work and labor for plaintiff and to the agreement that the note in suit should be paid by his work and labor and applied weekly by endorsement on the note. The value of the services so proved exceeded the amount of the note and interest. No objection was made to such evidence. Afterwards defendant Mernaugh was called as a witness and testified to the contract between plaintiff and Hendricks, that plaintiff should furnish Hendricks with work to pay the note and that as fast as the money was earned it should be endorsed upon the note. On these conditions Mernaugh signed the note as surety for Hendricks. This evidence was objected to on the ground that it tended to vary the terms of the note.

*Myron G. Bronner*, for applt.

*Smith & Steele*, for respnt.

*Held*, That the objection is not well taken. The evidence does not contradict or vary the note, but simply shows that work done or to be done by Hendricks for plaintiff was to be applied upon the note.

Under such an agreement the work when done constituted a payment *pro tanto* of the note and to the extent of the value of the services so rendered Mernaugh was discharged from his liability. It was not inconsistent with the note and no reason is apparent why the evidence was not competent.

Judgment of County Court affirmed, with costs.

Opinion by *Boardman, J.*; *Hardin, P.J.*, and *Follett, J.*, concur.

#### MUNICIPAL CORPORATIONS. EVIDENCE. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John F. Hirsch, *respt.*, v. The City of Buffalo, *applt.*

Decided April, 1885.

A city is liable for injuries resulting from the overturning of a load of hay caused by the rudders of the sleigh sliding down the snow thrown up and along the sides of the street from the railroad track and striking the iron track, if it rendered the street unsafe and dangerous for travel and the city allowed it to remain so an unreasonable time.

Where one witness testifies that he pointed to another the place where the accident occurred, it is competent for the other to testify as to the condition of the street at that place before and at the time of the accident, although he was not then present. Injury to the person occurred in January, 1877, and action was brought September 29, 1879. The Code took effect September 1, 1877, at which time the limitation was one year. *Held*, That the limitation of three years prescribed in § 383 governed, and the case was not within the exceptions embraced in § 414.

Appeal from judgment entered upon verdict in favor of plaintiff.

Action to recover damages for injuries, alleged to have been sustained by reason of the negligent omission by defendant to remove or level the snow thrown from the tracks of the street railroad company upon the remaining portion of the street. Plaintiff was upon a load of hay driving his team. The snow had been scraped from the railroad tracks towards the sides of the street. At the place of the accident it had become hard and slanted toward the railroad track; and as plaintiff drove upon it, the rudder of his sleigh slid down, striking against the railroad track, the load overturned, and he was thrown to the ground, fracturing his thigh, etc. There was some evidence tending to show that the snow had been in this condition some period of time.

*George L. Lewis*, for respt.

*P. A. Matteson*, for applt.

*Held*, That the city was liable for the act of the street railroad company after a sufficient period of time had elapsed from which notice to the city of the condition of the street could be presumed or inferred; and that, upon the whole case, it was a question for the jury to determine.

It was the duty of the city to maintain its streets in a reasonably safe condition so that the public may pass thereon without injury. If a heavy body of snow had fallen the night before and was thrown up from the railroad tracks the city could not be expected or required to cause it to be forthwith removed or leveled. That might not be possible; but it is bound to

exercise reasonable diligence in keeping the streets in a safe and passable condition.

The fact that a street railroad has been constructed through the streets does not affect the liability or duty of the city. If the city, as a condition of the grant of right of way, has required of the railroad company to keep the streets in repair or free from snow, it has the right to enforce the performance of the condition; but it does not change or affect the rights of individuals who travel upon the highways and streets of the city.

It was also contended that the court erred in admitting the evidence of two witnesses in regard to the condition of the street where the accident occurred. They were not present at the time of the accident, but testified that the place was pointed out to them afterwards; and another witness who was present at the time of the accident testified that he pointed out to them the particular locality.

*Held*, That the testimony was competent and properly admitted.

Defendant moved for a dismissal of the complaint on the ground that the action was barred by the statute of limitations, which motion was denied. The accident occurred Jan. 23, 1877. At that time the limitation of actions for personal injuries was one year. This action was commenced September 29, 1879, more than one year after the accident occurred and more than two years after the Code took effect. The present Code limits the time within which actions of

this nature must be commenced to three years. The case in 93 N. Y., 522, is in point and decides the question here raised. It holds that § 383 Code Civ. Proc. extended the time within which actions must be brought to three years, and that after that section took effect, Sept. 1st, 1877, it constituted the only rule of limitations applicable to civil actions of this character. That this case is not within the exceptions embraced in § 414 of the Code.

Judgment affirmed.

Opinion by *Haight, J.*; *Bradley, J.*, concurs; *Barker, J.*, not sitting.

#### RAILROADS. CONTRACT. INJUNCTION.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Caroline W. Lawrence, executrix et al., *appls.*, v. The Saratoga Lake Railway Co., *respt.*

Decided May, 1885.

Plaintiff's testator owned a tract of land upon which was a boarding house and a mineral spring. Defendant wished to secure a right of way through the premises. The testator entered into a written agreement with defendant as to the matter and a map was made upon which the locations of the said road, proposed bridges and structures were shown. By this agreement defendant covenanted to build certain bridges and crossings and to erect a station at which regular trains should stop. Having built its road it refused to perform its covenants. The agreement did not specify the size, material or manner in which the crossings, etc., were to be built. *Held*, That the agreement was sufficiently definite and that specific performance should be awarded,

and that plaintiff was entitled to an injunction requiring all regular trains to stop at said station.

Appeal from judgment dismissing complaint.

Action for specific performance of a contract made by defendant with plaintiff's testator. The testator owned a tract of land in Saratoga Springs, upon which was a boarding house and a mineral spring. Defendant desired to acquire a right of way through the premises and prepared a map showing the same. Testator agreed to give the right of way provided defendant built the road so as not to disfigure the land and in a manner described by him, provide proper crossings at certain points, and erect at the spring a neat station, which should be a station at which all regular trains should stop. Defendant accepted the proposition and built its road, but, as far as the evidence shows, without any regard to the agreement. At Special Term the judge found that defendant was in default upon all points, but held that the agreement was so indefinite that specific performance could not be decreed; dismissed the complaint without costs and left plaintiffs to proceed in some other way.

*C. S. Lester*, for applt.

*A. Pond*, for respt.

*Held*, Error. We think the contract sufficiently definite. It is said that the kind of bridge and its material is not stated. A bridge suitable for a highway crossing is intended, and that is definite enough. 81 N. Y., 190. It is also said the station is not well de-

scribed. Let defendant erect such a station as it has done within 4,000 feet of this point and at other points, and a jury or court could easily decide whether the building was a reasonable performance or an evasion. It is said that equity will not enforce specifically a contract to build or repair. But it will do so, in some instances, where plaintiff cannot himself build or repair, and damages would not compensate. The land is now in equity defendant's. It has contracted to construct certain things on this land and in that construction plaintiff has an interest. There has been a part performance and defendant is enjoying the benefits *in specie*. This brings the case within well established exceptions to the general rule. Fry on Spec. Perf. § 81; Pomeroy Eq., § 1402, note: 2 Y. & C. 48; 11 Paige 414; 2 Kay & J. 394; L. R., 13 Eq., 44; 11 Beav. 497.

Objection is also made to the agreement to stop all passenger trains. It is said that specific performance will not be granted where the contract requires continuous personal action running through an indefinite period. 10 Wall. 399. But the propriety of granting this relief in a case like the present was recognized in *Phillips v. G. W. R. W. Co.*, L. R., 7 Ch. Ap. 409. See also 2 *Phillips* 44. The remarks, relied upon by defendant, made by the court in *Blanchard v. Detroit* 31 Mich. 43, were *obiter*. Here the defendant is not required to run any trains at all, but if it does so, they must stop. Such a remedy may be granted by injunction.

We are asked to modify the judgment and grant the relief required, but as evidence may be needed at the trial to explain the circumstances of the agreement, the time needed to build, etc., we prefer to reverse the judgment and grant a new trial.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs.

### WILLS.

#### N. Y. COURT OF APPEALS.

*Miller, applt., v. McBlain, exr., respt.*

Decided March 27, 1885.

Testator, after giving his wife a life estate, directed that at her death the property should be divided in equal shares, one of which he gave absolutely to each of his children. The will provided that if either of the children died without issue his share should be divided between the survivors and their heirs. *Held*, That the words of survivorship related to the death of the widow and the period of distribution, and at that time each child was entitled to his share absolutely, and the subsequent death of either without issue vested no estate in the survivors.

This action was brought to recover the sum of \$1,800, being the share of defendant's testatrix in the estate of D., deceased, plaintiff claiming that under the provision of the will of D. said share vested in her. D. by his will gave his wife a life estate in all his property. After her death he directed that whatever remained should be divided into twelve shares, one of which he gave "absolutely and wholly to each" of his twelve children. In case any of the children died without issue the will provided that "his or her or their part

or parts of my estate shall be divided between the survivors and their heirs in equal proportions." Defendant's testatrix died without issue, and plaintiff is sole survivor of the children of D.

*B. Hammond*, for applt.

*A. P. Rose*, for respt.

*Held*, That plaintiff could not maintain this action; that the words of survivorship in the will relate to the expiration of the life estate of the widow and the period of distribution, and at that time each one of the children was entitled to his or her share absolutely, and the death of defendant's testatrix without issue vested no estate in the plaintiff.

Judgment of General Term, affirming judgment for defendant on order sustaining demurrer, affirmed.

Opinion by *Danforth, J.* All concur.

## STATUTE OF FRAUDS.

N. Y. COURT OF APPEALS.

*Babcock, respt., v. Read, applt.*

Decided April 14, 1885.

Defendant having, as agent, purchased certain real estate for one D., desired to take an interest in the purchase. D. proposed that he should take the chances of profit or loss and go in even. Defendant agreed to this and D. completed the purchase, paying his own money and taking title in his own name. *Held*, That the contract was valid within the statute as being in the nature of a partnership agreement.

This was an action upon an oral contract between D., plaintiff's

assignor, and defendant. They were both residents of New York city, defendant being a member of a firm of brokers engaged in the purchase and sale of real estate. D. was a merchant of means who had purchased for use and speculation real estate through said firm as his agents. Defendant knowing this fact in March, 1877, stated that a certain house was for sale very cheap, and recommended him to buy it. D. said if defendant thought it cheap he would like to buy a little real estate and was ready to buy it. A few days after defendant stated to D. that he could pay him \$1,000 profit on the purchase and would like to give him \$500 for a half interest in the purchase. D. replied: "I am willing to let you in on joint account; take pot-luck profit and loss and go in even." The defendant then accepted this proposition. D. completed the purchase, paying for the property with his own money and taking the title in his own name. Defendant took the agency for the resale of the property. Subsequently D. met with business reverses and was obliged to sell the property at a loss, which he did after consultation with and notice to defendant. Immediately after the sale D. rendered an account to defendant showing the total receipts and disbursements and demanded of him one-half the loss. Then and afterwards defendant upon being applied to for payment promised to see D. and arrange it with him, and on one occasion offered to pay \$500 in settlement, and never until this action was com-



menced denied his liability for the amount claimed.

*Joseph A. Welch*, for applt.

*M. W. Devine*, for respt.

*Held*, that the contract was valid within the statute of frauds as being in the nature of a partnership agreement. 67 N. Y., 30; 54 id., 1, 403; 45 id., 39; 2 Vesey, 696; 18 Hun, 81.

Order of General Term, reversing judgment dismissing complaint and ordering new trial affirmed, and judgment absolute for plaintiff on stipulation.

Opinion by *Ruger*, Ch. J. All concur.

## MUNICIPAL CORPORATIONS. NEGLIGENCE.

### N. Y. COURT OF APPEALS.

*Russell*, respt., v. *The Village of Canastota*, applt.

Decided March 24, 1885.

A municipal corporation is not released from responsibility for a defect in one of its sidewalks by the mere service of notice to repair on the adjoining owner. After notice of the defect it should cause it to be immediately repaired; or if delay is necessary, close the walk against the public by a guard or barrier.

This was an action to recover damages for injuries received by plaintiff, through the alleged negligence of defendant in omitting to keep its sidewalks repaired and in safe condition. By its charter (Laws of 1870, Ch. 291) defendant's board of trustees are made commissioners of highways with power over its streets and sidewalks, and "to keep the same in good order, repair and condition." They are also

authorized to make ordinances and by-laws for certain purposes, among others, to keep the streets in good order and to improve the sidewalks. They also have power to compel the owners of lots in front of which a sidewalk is to be made or repaired, to make such improvements upon the sidewalk, and in case they shall neglect "to complete the required improvement in such reasonable time, as shall be required by the trustees" they may cause it to be made and assess the expenses upon the owner. It appeared that defendant having received notice of the defective condition of the sidewalk at the point where plaintiff was injured, had served a notice upon the owner of the premises in front of which the defective sidewalk was, to repair the same, but that he had failed to do so. The plaintiff was injured several days after such notice was served.

*Charles Beale*, for applt.

*G. A. Forbes*, for respt.

*Held*, That the mere service of the notice did not release the defendant from any further responsibility for injuries resulting from the unsafe condition of the sidewalk. It was still its duty to keep the sidewalk in such condition that it might be safely traveled, and after notice of an existing danger cause immediate reparation, or if delay was necessary, by some guard or barrier close it against the public so that no harm should happen from the repair being delayed. For a failure to use reasonable care and vigilance the defendant was liable.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

## PRIVILEGED COMMUNICATIONS.

### N. Y. COURT OF APPEALS.

*Westover, exr., respt., v. The Ætna Life Ins. Co., applt.*

Decided April 14, 1885.

Whenever the evidence offered comes within the purview of the statutes relating to privileged communications it may be objected to by any one unless it be waived by the person for whose benefit the statute was enacted. An executor or administrator of such person cannot make such waiver.

This was an action upon a policy of life insurance issued by defendant to G., plaintiff's testator. The policy provided that it should be void if the insured committed suicide or died by his own hand. He hung himself. Plaintiff gave evidence tending to show that G. hung himself while insane. He called as a witness a physician who had known G. for a long time and had attended him professionally a short time before his death. He testified that he visited him first in June, 1881, and was then asked: "State how you found him?" Defendant's counsel objected to this question, on the grounds that the evidence was incompetent and privileged under § 834 of the Code of Civil Procedure. The objection was overruled and the witness answered at length, giving important evidence as to

the mental and physical condition at that time and subsequently of the insured. Section 833 of the Code provides, that: "A clergyman, or other minister of any religion shall not be allowed to disclose a confession, made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." Section 834 provides, that: "A person duly authorized to practice physic or surgery, should not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." Section 835 provides, that: "An attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon in the course of his professional employment."

Section 836 provides that: "The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client."

*Rollin Tracy*, for applt.

*S. E. Payne*, for respt.

*Held*, That the court erred in receiving the testimony; that the provisions of law above quoted are founded upon public policy, and in all cases where they apply the seal of the law must forever remain until it is removed by the person confessing, or the patient or client. 67 N. Y., 185; 77 id., 564; 79 id., 424; 80 id., 281; Greenl. on Evi., § 243; Wharton on Evi., §

584. Whenever the evidence comes within the purview of these statutes it is absolutely prohibited and may be objected to by any one, unless it be waived by the person for whose benefit and protection the statutes were enacted. An executor or administrator does not represent the deceased for the purpose of making such a waiver. 5 C. & P. 177.

Order of General Term, affirming order denying a motion for a new trial, reversed, and new trial granted.

Opinion by *Earl, J.* All concur.

#### BANKS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Julia Riley, adm'rx., applt., v. The Albany Savings Bank, respt.*

Decided May, 1885.

Three persons deposited with a bank and to her credit money of a woman, then insane, upon an agreement made with the paying teller that it was not to be withdrawn except in the presence of all three. No such agreement was entered in the pass-book and the teller had no authority to make such an agreement. Subsequently one of the three presented a check or order signed by the insane woman with her mark and witnessed by another person and also the pass book. The subscribing witness' signature was identified and the bank paid. It had no notice of her insanity. *Held*, That the bank was protected; that the teller had no apparent authority, by virtue of his position, to make such an agreement as above stated, and that the bank was not put on inquiry by the circumstances of the deposit and its withdrawal.

The administrator of the insane person proceeded in a Surrogate's Court against the person who drew out the money and

it was there adjudged that the money drawn out was the proper money of the insane person and was in the possession of the man proceeded against. *Held*, That the administrator had elected his remedy and could not thereafter bring this action against the bank for the same debt.

This action is by the administratrix of Mary Riley to recover a deposit. In August, 1882, P. F., P. H. R. and M. S. brought to the bank this deposit, which belonged to M. R. now deceased, deposited it to her credit and received the usual pass-book. The Circuit Judge found that the paying-teller T. was then informed that the money should not be withdrawn unless all the three persons who made the deposit were present. No such agreement was written in the pass-book, and the teller denied making it. In Sept., 1882, P. F. got Mary Riley to sign a check payable to her or bearer for the deposit. This was signed by her mark, witnessed by J. The next day P. F. presented the check with the bank-book; the signature of the subscribing witness was identified and defendant paid in good faith. The court found that at this time, from disease and old age, M. R. was of unsound mind and did not comprehend this act. Soon after she died and letters of administration were issued to P. H. R. Oct. 3, 1882, who on Oct. 7, 1882, presented a petition to the surrogate stating that P. F. deposited the money in the bank upon the agreement that it should remain until the decease or recovery of M. R., and that he had drawn it out fraudulently, that he withheld

it, and asked a citation for its discovery. P. F. appeared, admitted in court that he drew out the deposit, "the proper money of M. R.," and on Oct. 11, 1882, it was decreed that P. F. was in possession of it, and that he surrender it to P. H. R. Failing to do this he was imprisoned, but was released on account of ill health. P. H. R. died and plaintiff was appointed administratrix in his place. She brings this action and recovered.

*Leonard G. Hun*, for aplt.

*Colvin & Guthrie*, for respt.

*Held*, That plaintiff had no cause of action. Assuming that the learned justice was correct in finding that there was an agreement that the three persons should be present when the deposit was drawn out, still there is no proof that this agreement was only for the life of Mary Riley. P. H. F. alone demanded this deposit of the bank after her death, and therefore his demand was not a valid one.

But again, the pass-book was the contract, and it was clearly shown that only the President had authority to receive deposits upon any other terms than those usual in such matters. There was no evidence of any apparent authority in T. the paying teller, beyond receiving deposits and giving pass-books. Agreements must be mutual. Can it be claimed that if Mary Riley had come to the bank with her pass-book and demanded the money that the bank could have refused to pay because the three other persons were not present? She was not a party to this

agreement, for the money was deposited without her knowledge or consent.

It appears, however, that the money had been drawn out at the instigation of the overseer of the poor, who had been applied to to assist her. In fact about one-third of it was expended for her and for her funeral. The bank had no notice of her insanity and was not put on inquiry, we think, (as was charged below) by her old age, her making her mark, or by the unusual circumstances of the deposit. Its being drawn out by P. F. R. was not unusual. He was one of the depositors of it, and the bank was informed at the time of the deposit that it might be drawn out; of course, upon Mary Riley's order. He brought that order.

There is another objection. The administrator has elected his remedy. In the proceedings in the Surrogate's Court it was adjudicated that P. F. had obtained from defendant the deposit, the proper money of Mary Riley, and that he was in possession of it. This proceeding was under Code Civ. Pro. § 2706 *et seq.* By § 2710, as amended, if the person cited answers in writing that he is the owner of the property the proceeding must be dismissed. P. F. did not so answer and the proceeding was conclusive that he had received from defendant the money of Mary Riley. If so, defendant has paid her, and the proceeding was a ratification of the payment by her administrator. If he had chosen not to ratify it he should have brought this action but not that proceeding. It is

plain that he cannot have a decree against P. F. for a debt and a judgment against defendant for the same debt.

Judgment reversed, and new trial granted.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs; *Bockes, J.*, dissents.

### SURROGATE. ACCOUNTING. LIMITATION.

#### N. Y. COURT OF APPEALS.

*In re* accountings of ex'rs of Tilden, deceased.

Decided March 10, 1885.

Where the accounting of executors is sought to be vacated on the ground of the infancy of one of the parties at the time of such accounting, the proceeding therefor must be commenced within one year after the minor attains his majority.

Where several successive accountings are had, each based upon the one preceding, the validity of each previous accounting being unchallenged by any objection, the last decree is binding and conclusive as to the validity of those preceding it.

The words "other sufficient cause" in § 3347 of the Code mean causes of a like nature with those specifically named.

Reversing S. C., 19 W. Dig., 128.

A motion was made on behalf of B., a son of T., to vacate certain decrees made by the surrogate on accountings by the executors of T., so far as they affected B. The petitioner sought to have the decrees vacated on the ground of errors of fact which did not appear on the record. At the time the last decree was made he was a minor. His application to vacate the decrees was not made until

over two years after he had attained his majority.

*Samuel Hand*, for applts.

*W. S. Macfarlane*, for respt.

*Held*, That the surrogate had no jurisdiction to grant the motion. When the ground of relief is the infancy of the party applying, or for irregularities in the course of proceedings, it is governed by §§ 1283, 1290 of the Code of Civ. Pro., and should be made within one year after the minor arrives at the age of twenty-one years.

It appeared that there had been several accountings by the executors, and that each subsequent account was based upon the one preceding, and the validity of each previous account in the decree being unchallenged by any objection was assumed and judged to be correct in each succeeding accounting. Each successive decree was instituted upon citations duly issued and served on the parties interested, and was based upon proceedings regularly conducted.

*Held*, That the last decree was binding and conclusive upon all the parties as to the validity of those preceding it.

*Also held*, That the application of petitioner was a special proceeding, and having been commenced after September 1, 1880, it must be governed by the terms of subdivision 8 of § 3347 of the Code of Civ. Pro., and not by the law which prevailed when the decrees assailed were respectively made.

The power of the surrogate is limited by said section when an application is made to cases of

"fraud, newly discovered evidence, clerical errors, or other sufficient cause."

*Held*, That the words "other sufficient cause" must be held to mean causes of like nature with those specifically named. 74 N. Y., 389.

The causes for which judgments might be vacated under § 2481 of the Code are analogous to those contained in §§ 1282 and 1283, and are governed by the limitations imposed therein, except in cases where fraud and collusion are made the ground for the application for relief. Relief from judgments regularly taken against minors, or errors of fact not arising on the trial, must be applied for within one year after the minor reaches his majority. The necessary implication from this requirement is that after that time no relief can be had by motion in the cases stated in the statute.

*Also held*, That the order vacating and setting aside the decrees was the necessary termination of the proceeding, and it was a final order.

Order of General Term, reversing decree of surrogate denying motion to vacate certain decrees, reversed, and that of surrogate affirmed.

Opinion by *Ruger, Ch.J.* All concur.

#### NEGLIGENCE. EVIDENCE.

##### N. Y. COURT OF APPEALS.

*Lockwood, admr'x, respt., v. The N. Y., L. E. & W. RR. Co., applt.*

Decided March 27, 1885.

In an action for death caused by negligence, evidence that the children of deceased have no property is admissible, although they are of full age and reside away from his home; evidence that a daughter who resided at home had a disease which incapacitated her from working as if she were well, is also admissible. Affirming S. C., 20 W. Dig., 341.

This action was brought to recover damages for negligence in causing the death of L., plaintiff's intestate. It appeared that L. at the time of his death was about sixty-eight years old, and left seven children, all of whom were past twenty-one years of age, and all but two of them living away from his home. The children living away from home had been supporting themselves for years and received nothing from L. by way of support. One unmarried daughter lived with L. at the time of his death and did household work for him, receiving nothing for her work and paying nothing for her board. A son who was married also lived and boarded with L., but worked for himself, using his own earnings. Plaintiff, against defendant's objections, was allowed to prove that the children of L. had no property of their own, and that the daughter who lived with him was afflicted with a disease which incapacitated her from working as if she had been well. Defendant's counsel requested the court to charge that: "Where the children are of full age and living away from the home of the deceased and are supporting themselves, no such pecuniary loss has been sustained by them as can be recovered for in this action. If the

jury find from the evidence that such a state of facts existed here they cannot include in their award any pecuniary damages resulting to them." This request was refused.

*Samuel Hand*, for applt.

*Hugh Reilly*, for respt.

*Held*, No error; that the judge's rulings are sustained by the decisions in this State. 24 N. Y., 471; 29 id., 252; 37 id., 287; 47 id., 317; 15 Hun, 559; 77 N. Y., 588; 15 W. Dig., 392; 92 N. Y., 661, 219.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinion by *Earl. J.* All concur.

# TITLE TO PERSONAL PROPERTY.

N. Y. SUPREME COURT. -GENERAL TERM. FIRST DEPT.

Moses Brown et al., *applt.*, v. Peter Bowe, *respt.*

Decided March 27, 1885.

When a debtor, in payment of his debt, delivers goods to a railroad company consigned to his creditor and forwards the bill of lading with an invoice or bill of sale of the goods to his creditor, the title to the goods is thereby transferred to the creditor subject only to his refusal to accept the consignment when the facts come to his knowledge; and, after such acceptance, the title vests absolutely in the creditor. When a sheriff is sued for conversion of goods which he took from plaintiff under an attachment against the property of another person, title out of the plaintiff and in another person than the one against whose property the attachment was issued cannot be relied upon or proved by way of defense to the action.

Appeal from judgment recovered on the report of a referee.

One D., a merchant in Indiana, was indebted to plaintiff for goods sold and delivered to him, and in 1880 his circumstances having become such as to prevent him from continuing his business, delivered certain goods to the Cleveland, Columbus, Cincinnati and Indianapolis R. Co., addressed to plaintiffs, and took from the railroad company a bill of lading by which the company acknowledged the receipt of the goods and agreed to deliver them to plaintiffs at N. Y. Subsequently D. enclosed the bill of lading with a bill of sale or invoice of the goods in a letter informing plaintiffs that he had shipped the merchandise in payment of their account against him and mailed the same to plaintiffs. On the following day D. made a general assignment for the benefit of his creditors. After the receipt of D's letter plaintiffs entered the merchandise upon their books as stock to arrive and repeatedly called at the office of the railroad company to obtain it, but before they got possession of it it was seized by defendant as sheriff of the County of N. Y. under an attachment against the property of D.. This action was brought to recover for conversion of the goods, and the referee found that plaintiffs were not entitled to maintain it.

*F. C. Reed*, for applts.

*Melville Regenburger*, for respts.

*Held*, That by the delivery of the goods to the railroad company to be carried and delivered to plaintiffs, and the taking of the bill of lading for their benefit by D. and

mailing it to them with the invoice or bill of sale, the company became the bailee of the goods for the plaintiffs' use and benefit. That the intention of D. was thereby to transfer to and vest in the plaintiffs the title to the goods, and when he placed them in the possession of the railway company to carry that intention into effect and mailed the invoice and bill of lading to plaintiffs, his right to and authority over the property were for the time being at an end, and the title vested in the plaintiffs subject only to their refusal to accept the consignment when the facts came to their knowledge. 3 East., 585; 2 Bingham, 20; 24 N. Y., 536.

That before the attaching creditors in whose behalf defendant acted took any proceeding for the collection of their debt the plaintiffs had actually accepted and assented to what D. had done to transfer the title to them, and from that time they became the complete and absolute owners of the property as against attachments afterward issued in behalf of any of Day's creditors. 40 N. Y., 519.

That defendant did not proceed under the authority of the general assignment made by D., and was not entitled to claim any benefit from its execution and delivery. That where an action is brought to recover for the unlawful or wrongful taking of personal property from the possession of plaintiff, title out of plaintiff and in another party can neither be relied upon

or proved by way of defense to the action. 71 N. Y., 36.

Judgment reversed, and a new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

#### CONTEMPT. COMMITMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The people ex rel., Rebecca Jones, *applt.*, v. Alexander V. Davidson, sheriff, *respt.*

Decided March 27, 1885.

A witness convicted of contempt of court for the contumacious and unlawful refusal to answer certain legal and proper interrogatories propounded to her as a witness on a certain day cannot be committed to the county jail "until she shall purge herself of the contempt aforesaid, and make answer to such legal and proper interrogatories which may be propounded to her as a witness," but only until she shall make answer to the interrogatories which were propounded to her on the previous day.

Appeal from order of one of the justices of the Supreme Court dismissing writ of certiorari and remanding the relator.

The relator was convicted of contempt by the Surrogate's Court of N. Y. county for the contumacious and unlawful refusal to answer certain legal and proper interrogatories propounded to her on the 19th day of May, 1884, after she had been sworn as a witness in a proceeding pending in that court. For this contempt she was punishable civilly under § 14 of the Code of Civ. Pro. by being imprisoned in the county jail. The warrant of commitment issued on the proceed-



ing recited the order of the surrogate whereby the relator was convicted of the contempt aforesaid, and whereby it was ordered that she stand committed to the county jail, there to remain, charged with the said contempt, until she should make answer to such legal and proper interrogatories as should be propounded to her as a witness in the cause, and commanded the sheriff to keep her safely and closely in his custody in the common jail of the county of New York until she should purge herself of the contempt aforesaid and make answer to such legal and proper interrogatories which might be propounded to her as a witness in the proceeding aforesaid.

*Wm. H. Shepard*, for relator.

*Franklin Bartlett*, for respt.

*Held*, That the recital and mandate did not comply with the requirement of the statute.

That the statute is explicit that where the contempt is an omission to perform an act or a duty which it is yet within the power of the offender to perform, he shall be imprisoned only until he has performed it. Code Civ. Pro., § 2285. That the act or duty of the relator in this case, which it was still within her power to perform, was to answer the questions propounded to and refused by her on the 19th day of May, 1884.

That the statute is also explicit that the order and the warrant of commitment "must specify the act or duty to be performed and the sum to be paid," § 2285 *supra*, so that by payment and performance of the things specified, the party

convicted of the civil contempt can promptly terminate his imprisonment.

That this writ of commitment was not of this character. That the relator could not at any time pay her fine and demand to terminate her imprisonment by going before the surrogate and answering the questions she had refused to answer on May 19th, 1884, because the writ of commitment required, and the order as recited also required, that she should answer "such legal and proper interrogatories as shall be propounded to her as a witness in this cause," and "make answer to such legal and proper interrogatories which may be propounded to her as a witness in the proceeding aforesaid." That neither the process nor the order as recited gave her the opportunity to purge her contempt and terminate her imprisonment as the provisions of the Code prescribes by doing the things she had refused to do; that was, simply to answer the questions actually put on the 19th of May.

Order reversed, and relator discharged.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

#### TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Jacob Zoller, *applt.*, v. Joseph H. Groht et al., *respts.*

Decided March 27, 1885.

The cause of action stated in the complaint determines the rights of the parties to a

jury trial, and such right cannot be defeated by the form of the answer interposed.

The question of the right to a jury trial can be raised upon an appeal from the judgment rendered in the action by an exception taken to the refusal of the court to grant such trial upon a demand made for the same before any evidence was taken in the case, and the right to raise such question is not lost by defendant by proceeding with the trial of the case after such refusal and cross-examining plaintiff's witnesses.

Appeal from a judgment recovered on trial at the Special Term.

Plaintiff sued to recover \$3,845.-54 for goods sold and delivered to defendants. The main defense relied upon was that plaintiff had entered into a copartnership with defendants for the sale of said goods on joint account, and that the goods were delivered under this arrangement, and that no account thereof had ever been adjusted, made, or stated between defendants and plaintiff. Plaintiff noticed the case for trial at the Special Term, and defendants noticed it for Circuit, and upon its coming on for trial at the Special Term, defendants, before any evidence was taken, demanded a jury trial and moved that the case be sent to the Circuit. This demand was refused, and defendants excepted. Plaintiff then proceeded with the trial, and produced witnesses whom defendants cross-examined. Defendants produced no witnesses, and judgment was rendered in favor of plaintiff. Plaintiff claimed that defendants had waived a trial by jury by their action in the case.

*George F. Harriman* and *B. W. Cohen*, for applt.

*J. George Flammer*, for respts.

*Held*, That the complaint presented no cause of action for trial by the court, and the allegations of partnership in the answer did not change the nature of the action as it was presented by the complaint.

That the claim was a legal and not an equitable demand, and defendants were entitled to have the action tried by a jury. That was denied them, although the claim made for that purpose was presented before the commencement of the trial; and for that denial the judgment must be reversed and a new trial ordered, with costs to abide the event.

Opinion *per curiam*.

## SURETYSHIP.

N. Y. COURT OF APPEALS.

The Mayor, etc., of N. Y., *applt.*,  
v. Kelly, adm'rx, et al., *respts.*

Decided March 17, 1885.

The sureties on a bond for faithful performance by their principal of the duties of his position are not discharged by the imposition of new duties which are separable and distinct from those protected by the bond, unless such new duties render impossible or materially hinder or impede the proper performance of the duties guaranteed, even though the new employment exposes their principal to temptation or gives a broader opportunity for dishonesty.

This action was brought upon a bond executed by K., defendant K.'s intestate and defendant C. as sureties for the faithful performance by B. of his duties as book-keeper in the department of docks in the City of New York. The de-

fendants claim that they are relieved from liability on their bond by the fact that B., in addition to the duties of bookkeeper, was required to perform and did continuously perform the duties of treasurer of the department of docks. It appeared that B. was required to assist the treasurer of the department of docks in receiving and depositing to the credit of said treasurer the funds of the department; that from time to time he embezzled sums of money amounting in the aggregate to over \$40,000, concealing the same by false entries in the books or by a failure to enter receipts. It was not claimed that B. was hindered in properly performing the duties of bookkeeper by the additional duties imposed.

*D. J. Dean*, for applt.

*Wallace Macfarlane*, for respt.

*Held*, That defendants were liable for a breach of their bond in the failure of B. to faithfully perform his duty as bookkeeper. The question of the damages resulting from such a breach was one for the consideration of the jury.

The sureties upon a bond like the one in suit are not discharged by the imposition of new duties which are distinct and separable from those protected by the bond, unless such new employment renders impossible or materially hinders or impedes the proper and just performance of the duties guaranteed. The fact that the new employment exposed their principal to temptation, or gave broader opportunity for dishonesty, is immaterial. 90 N. Y., 116; 21 id., 881.

*Sup'rs v. Pennock*, 60 N. Y., 426; *Ward v. Stahl*, 81 id., 406; *People v. Vilas*, 36 id., 460, distinguished.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Finch, J.* All concur.

## STATUTE OF FRAUDS.

### N. Y. COURT OF APPEALS.

*Ackley, ex'r., applt., v. Parmenter, respt.*

Decided March 10, 1885.

A mortgage belonging to plaintiff's testator had been foreclosed by plaintiff and a sale was about to be had. Defendant then said to plaintiff that the mortgagor had placed in his hands stock to bid off the property and pay plaintiff his claim in full, if the sale was adjourned for ten days; that in ten days he would be prepared to pay. In reliance on this promise the sale was adjourned, and when had, resulted in a large deficiency. In an action on this promise, *Held*, That the promise was void under the statute of frauds, even though the stock had been placed in defendant's hands as he represented.

Affirming S. C., 18 W. Dig., 427.

This action was brought on an alleged verbal promise made by defendant to plaintiff. It appeared that plaintiff held a mortgage executed by one S., which he had foreclosed and advertised for sale. At the time and place mentioned in the notice of sale defendant requested plaintiff to adjourn the sale ten days, and said that if he would do so he would then attend and bid off the property and pay plaintiff the full amount of his claim. Defendant also represented that S., the mortgagor, had placed

in his hands certain stock, which would protect him in his undertaking. In consideration of his promise plaintiff adjourned the sales as requested. On the adjourned day defendant refused to perform his promise, and bid only \$1,820 for the premises, at which sum they were struck off to him, and which was \$920 less than plaintiff's claim amounted to. Plaintiff entered a judgment against S. for such deficiency, but has collected nothing thereon as S. was insolvent.

*James Lansing*, for applt.

*R. A. Parmenter*, for respt.

*Held*, That defendant's promise was void under the Statute of Frauds, even though S. had placed the stock in defendant's hands as he represented. 75 N. Y., 446.

A consideration is not of itself sufficient to supply the place of a writing where one is necessary. To take the case out of the statute there must be a consideration moving to the promisor, either from the creditor or the debtor. It must be beneficial to the promisor. That is the feature which imparts to the promise the character of an original undertaking. Forbearance or indulgence to the debtor, or the surrender to him by the creditor of a security for the debt, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt. 21 N. Y., 412; 75 id., 446; 12 Johns., 291.

Judgment of General Term, affirming judgment of nonsuit, affirmed.

Opinion by *Rapallo*, *J.* All concur.

## JUSTICE'S COURT. EXECUTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Daniel S. Jones, adm'r, *respt.*,  
v. Emory E. Newman, *applt.*

Decided May, 1885.

An execution issued out of a Justice's Court is not void although the docket fail to state all the particulars required by Code Civ. Pro., § 3140.

The death of plaintiff in an execution in a constable's hands does not suspend the operation of the execution. It will not be a defence to sureties in a constable's bond that it does not comply strictly with the condition required by Chap. 788, Laws of 1872.

This was an action under Code Civ. Pro., § 3039, against the sureties of a constable for not returning an execution. The County Court affirmed a judgment of a justice of the peace. The appeal is upon questions of law.

*J. B. Olney*, for applt.

*Sidney Crowell*, for respt.

*Held*, That the judgment should be affirmed. The docket of the justice only stated that he issued the execution in question to plaintiff. We do not think the execution void because the docket did not show all the particulars required by Code Civ. Pro., § 3140. The execution was issued Jan. 9, and the plaintiff in the original judgment died March 10. We are not referred to any case showing that the death of plaintiff while the execution is in the officer's hands suspends its operation.

The condition of the bond given by the constable does not comply with the form required by Chap.

788, Laws of 1872. Its condition is that the constable shall faithfully discharge his duties, and shall account for and pay over all moneys received by him as such constable. It was approved by the supervisor and filed with the town clerk. Within the cases 81 N. Y., 573, and 30 Barb., 551, we think the bond was not invalid. It was the duty of the constable to give a proper bond, and of himself and sureties to see that it was in proper form. It would be inequitable that the sureties should now escape liability because of a variance not very important.

Judgment affirmed, with costs.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### SUPPLEMENTARY PROCEEDINGS. TAXES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Supplementary proceedings for the collection of a tax of Jacob Conklin.

Decided May, 1885.

In supplementary proceedings taken to collect a tax under Chap. 640, Laws of 1881, the affidavit will be sufficient if it state the facts required by § 1 of that act; it is not requisite that it state also the facts necessary to show the jurisdiction of the assessors and of the supervisors.

The affidavit showed that the tax exceeded ten dollars; that it was levied by the board of supervisors of the county; that it was against a person who was a resident of the county, and that it had been returned by the town collector uncollected for want of goods and

chattels out of which to collect the same. 'Because it did not show jurisdiction in the assessors and supervisors the county judge, upon an order to show cause, set the original order granted aside.

*C. C. Van Deusen*, for applt. Co. Treas.

*Newkirk & Chace*, for Conklin.

*Held*, Error. If the facts showing jurisdiction in the assessors and supervisors are to be stated it would seem that they might be denied. And the county judge might in these proceedings try those questions of jurisdiction. We do not think this was intended. The legislature had power to say upon what affidavit this proceeding might be taken, and § 1 specifies them. When they are not contradicted it is the duty of the county judge to proceed. The recitals in the warrant were enough for the collector, and the allegations in the affidavit were enough for the county judge.

Order reversed, with costs.

Opinion by *Learned, P. J.*; *Landon, J.*, concurs; *Bockes, J.*, dissents.

#### PARTIES.

N. Y. COURT OF APPEALS.

*Osterhoudt et al., respts., v. The Board of Supervisors of Ulster Co. et al., applts.*

Decided March 3, 1885.

In an action under Chap. 161, Laws of 1872, against the Board of Supervisors and the town auditors to set aside certain audits, the persons in whose favor the audits were made are necessary parties.

Although under §§ 452, 499 of the Code an omission to object to a defect of parties by demurrer or answer is a waiver of objection to the granting of relief on that ground, yet where the relief granted against a defendant would prejudice the rights of others whose rights cannot be saved by the judgment, and without whose presence the controversy cannot be completely determined, the court must direct them to be made parties before proceeding to judgment.

This action was brought under Chap. 161, Laws of 1872, as amended by Chap. 526, of the Laws of 1879, by plaintiffs as taxpayers of the town of Kingston against the Board of Supervisors of Ulster County and the board of auditors of the town, to vacate certain audits and to restrain the board of supervisors from lveying a tax for their payment, on the ground that such audits were "illegal, inequitable, unjust, false and fraudulent." The persons in whose favor the audits were made were not made parties to the action. The only defendants are the board of supervisors and the town auditors. The question of defect of parties was not raised by demurrer or by answer. That point was taken at the commencement of the trial and was overruled.

*F. L. Westbrook* and *J. Newton Fiero*, for applts.

*M. Schoonmaker*, for respts.

*Held*, That the persons in whose favor the audits were made were proper and necessary parties to the action. The enumeration in the act of 1872 of "the officers, agents, commissioners or other persons acting for or in behalf of any county, town or municipal corpora-

tion," as the persons against whom an action may be brought, does not dispense with the necessity of joining all other persons who will be directly affected by the judgment, and are necessary parties to a complete determination of the controversy.

Under §§ 452 and 499 of the Code of Civ. Procedure a defendant by omitting to object that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground; but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment, and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment.

Judgment of General Term, affirming judgment for plaintiffs, reversed.

Opinion by *Andrews, J.* All concur.

#### WILLS. VESTED ESTATES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Henry Miller et al., v Francis Caragher.*

Decided March 27, 1885.

The will of the testator contained the following clause: "I give and devise to my wife, J. M. D. E., all the rest and residue of my real estate as long as she shall remain unmarried and my widow; but on her decease or remarriage, the remainder I give and bequeath to my son H. or his heirs." *Held*, That H. having survived the testator the fee vested in him, and

that a deed executed by him and testator's widow, conveyed the fee of property which was included in the residuum.

Controversy submitted under § 1279 of the Code of Civ. Pro.

F. H. M. by his will devised to his wife, J. M. D. E., all the rest and residue of his real estate as long as she should remain unmarried and his widow; but on her decease or remarriage, the remainder he gave and bequeathed to his son H. or his heirs. The widow of M. and his son H. by an instrument in writing agreed to sell certain premises which were contained in the residuum of M.'s estate to defendant, and, at the proper time, in pursuance of the agreement, tendered a warranty deed with full covenants executed in due form. Defendant refused to comply with the contract, upon the ground that plaintiffs did not acquire by the will of M. an estate in fee simple in the premises proposed to be sold, but that their estate in the property was merely contingent, and that they could not therefore perform their contract, which required them to convey the fee. Therefore it was agreed that this action should be commenced and submitted upon the facts stated for determination by the General Term.

*More, Aplington & More*, for appts.

*Held*, That the testator intended upon the decease of his widow, or upon her remarriage, that his son H. should have the estate if he survived him, and if not, then his heirs should have the estate upon the happening of either one of

those contingencies. That the word "or" in the connection in which it was placed evidently referred to and was intended to provide against the death of H. prior to the testator. That, in other words, the testator meant to vest the estate in H. if he should survive him, and if not, in his heirs; but it was not to be enjoyed in possession until the death or remarriage of his widow, 25 Wend., 119; 68 N. Y., 227; 52 id., 118; 18 W. Dig., 569, and that therefore the union of H. and the widow in the conveyance would confer an absolute estate in fee simple under the provisions of the will.

Judgment for plaintiffs.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The N. Y. Infant Asylum, *applt.*,  
v. Theodore Roosevelt et al., *respts.*

Decided March 27, 1885.

The complaint in an action by a charitable corporation for a libel on account of which it is alleged that various persons declined to make charitable donations to plaintiff which it otherwise would have received should state the names of the persons who, for that reason, declined to make such contributions, and if it fails to state such names, the plaintiff will be ordered, upon motion, to serve a bill of particulars containing such statement.

Appeal from two orders requiring the service by the plaintiff of a bill of particulars.

This action was brought to recover damages for a libel alleged to have been published by the defend-

ants, by reason of which persons declined to make charitable donations to the plaintiff which it otherwise would have received. Two of these persons were named in the complaint, and others were referred to as John Doe and Richard Roe, and others whose names were unknown to plaintiff. By the order appealed from the plaintiff was required to serve a bill of particulars containing a statement of the names of the persons who had, for the above reason, declined to make contributions to or for the benefit of the plaintiff.

*Leceister Holme*, for applt.

*Jones & Roosevelt* and *Gherardi Davis*, for respts.

*Held*, That if plaintiff had been deprived of charitable donations by means of the publication alleged to have been libelous, and its officers had knowledge of the existence of that fact, they might fairly be presumed to know whom the individuals were who had declined to make such donations; and if they did, a reasonable understanding of the case to be made against the defendant at the trial required that information of the names of those persons should previously be given to the defendant, and since such information was not given in the complaint, the orders only supplied the defect existing in the complaint in this respect, and they were rightly made.

Orders affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

## INJUNCTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Theodore H. Friend, *applt.*, v. The Mercantile Trust Co., *impl'd*, etc., *respt.*

Decided March 27, 1885.

The defendant Trust Co. held certain bonds and stock of a corporation as trustee to secure certain notes of such corporation. Default was made in the payment of such notes, and the Trust Co. proceeded to sell the bonds and stock pledged to it. Plaintiff then commenced an action in which he procured an injunction prohibiting such sale, which was subsequently vacated. On an application to assess the damages sustained by the Trust Co. by reason of such injunction, *Held*, That the interest on said notes, which had accrued during the time said injunction was in force was a proper item to be included in the estimate of such damages under § 624 of the Code of Civ. Pro.

Appeal from an order confirming the report of a referee assessing the damages sustained by defendant Trust Co. under an injunction.

The Denver and New Orleans Railway Construction Company made certain promissory notes to the amount of \$1,400,000, with interest. To secure these notes the Construction Company pledged certain of its bonds and stock to the Mercantile Trust Co. as trustees for the holders of the notes. Default was made in the payment of these notes and the Trust Co. proceeded to sell the bonds and stock. Before the sale took place plaintiff brought this action to set aside the pledge of the securities and for other purposes, and obtained an injunction restraining



their sale. This injunction was subsequently vacated, and proceedings were then had to assess the damages sustained by defendant Trust Co. by reason of the injunction, and such damages were assessed at \$1,000, which was the full amount of the undertaking given by plaintiff. It appeared that the securities had not advanced in value during the time that the sale was suspended, and that interest on the notes had accrued during this intermediate period to an amount more than three times the amount for which the undertaking had been given.

*G. Zabriskie*, for applt.

*Geo. A. Strong*, for resp't.

*Held*, That while it was true that this accumulation of interest was not a loss of the trustees or of the creditors, for the amount finally realized was sufficient to pay the expenses and the debts due to them, still it was a loss to the Construction Company, which had placed the bonds and the stock in the hands of the Trust Company as security for the payment of the notes, and by its amount diminished to the same extent the amount the Construction Company would otherwise have received as a surplus from the sale; and that was a loss which, by § 624 of the Code of Civ. Pro., was required to be considered and borne under the undertaking given on the issuing of the injunction, so far as it could be included in it. 50 N. Y., 282.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

## MORTGAGE. PLEADING.

N. Y. COURT OF APPEALS.

*Calkins v. Bolton et al.*, adm'rs,  
*applts.* *Gray*, adm'r, *resp't.*

Decided April 14, 1885.

In an action of interpleader it appeared that plaintiff executed a mortgage to L. C., who was executrix of Z. C. L. C. having died, B. and S. were appointed administrators in her place and have possession of the mortgage, and claim that the consideration was derived from assets of the estate of Z. C. The mortgage was to L. C. individually. *Held*, That only the representative of L. C. could enforce the mortgage, and that the question whether she was guilty of a *devastavit* could not be determined in this action. The admission or denial of parts of the complaint "at" or "between" certain folios does not conform to the spirit of § 22 of the Code.

This action was brought against defendants B. and D., as administrators with the will annexed of B. C., deceased, and against G., as administrator of the goods, etc., of L. C. Plaintiff alleged the execution and delivery by him of a bond and mortgage for \$1,000 to L. C.; that it is due and he is ready to pay it, but that each party defendant claims the money; that B. and S. are in possession of the bond and mortgage, claiming that it belongs to the estate of Z. C., and that G., as administrator of the estate of L. C., makes a similar claim. Defendants answered separately. The answer of B. and S. refers to the parts of the complaint he admits or denies as "at" or "between" certain folios. They set up affirmatively that by the will of Z. C., L. C. was appointed executrix, and as such letters tes-

tamentary were issued to her, but she died leaving the estate unadministered and in her possession; that the consideration of the bond and mortgage in suit was derived from assets of Z. C., and should have been taken by her as executrix and not in her own name, and they ask that the bond and mortgage be reformed and corrected so as to run to L. C. as executrix, or to themselves as administrators with the will annexed. G. alleges in his answer that the bond and mortgage in suit belong to and are of the assets of L. C., and that as her administrator he is entitled to them. The court found that the bond and mortgage were executed by plaintiff to L. C. individually, and that G. as her administrator was entitled to them.

*E. M. Harris*, for appls.

*E. Countryman*, for respt.

*Held*, That the cause of action in the bond and mortgage upon default in payment accrued to L. C. personally, and not by reason of any right of her testator, and her personal representative only can enforce them. 8 Cow., 333; 59 N. Y., 574; 47 id., 360; 41 id., 315.

*Walton v. Walton*, 4 Abb. Ct. App. Dec., 512; *Luers v. Brunges*, 56 How. Pr., 282, distinguished.

Whether in dealing as she did L. C. was guilty of a wrong or devastavit could not be determined in this action.

*Also held*, That the references in the answer of B. and S. to the parts of the complaint admitted or denied as "at" or "between" certain folios serves no useful purpose

on appeal, the folios being those of the complaint as originally prepared, and not as appearing in the case; nor does it conform to the spirit of § 22 of the Code of Civil Procedure, which requires pleadings to be made out "in words at length and not abbreviated."

Judgment of General Term, affirming judgment in favor of the respondent, affirmed.

Opinion by *Danforth, J.* All concur except *Rapallo, J.*; *Andrews* and *Earl, JJ.*, not voting.

## RESTITUTION.

### N. Y. COURT OF APPEALS.

*Murray, respt.*, v. *Berdell et al.*, *appls.*

*Wallace, ex'r, respt.*, v. *Berdell et al.*, *appls.*

Decided March 17, 1885.

The Court of Appeals has power to restore in a summary manner only property or rights which have been lost by a judgment which it has reversed; it cannot interfere under § 1323 to restore property which has been taken and sold under other judgments, even where the effect of the reversal is to decide that such property was taken from the party legally entitled to it.

These were motions made under § 1323 of the Code of Civ. Pro., which authorizes the appellate court, upon the reversal of a final judgment, "to make or compel restitution of property, or of a right lost by means of the erroneous judgment." Both of the above entitled actions were creditors' suits, brought for the purpose of annulling as void, as against the creditors of R. H. B., two deeds of real estate executed by him. In

the case of *Murray v. Berdell* a judgment was rendered adjudging the deeds void as against the creditors of the grantor, and that the judgments recovered by plaintiff against R. H. B. were subsisting liens on the real estate conveyed, and it was liable to be sold thereunder as if such fraudulent conveyances had not been made. It did not direct any sale of the real estate. Executions were issued upon the original judgments and a sale was made thereunder of the interest R. H. B. had in the real estate at the time those judgments were docketed, and deeds thereof were executed to the purchasers. The judgment in the action declaring the deeds void was appealed from and reversed by this court.

*Alfred Taylor*, for motion.

*A. F. Murray, Jr.*, opposed.

*Held*, That the case presented is not a proper one for ordering restitution, the sale having been made under the original judgments and executions.

This court has power to restore in a summary manner only property or rights which have been lost by a judgment which it has reversed. It cannot interfere under § 1323 of the Code to restore property which has been taken and sold under other judgments, even though the effect of the reversal is to decide that the property was taken from the party legally entitled to it.

In the case of *Wallace v. Berdell*, the original plaintiffs had issued an attachment in an action against R. H. B., and under it the sheriff had levied upon and attached the real estate afterward

sold by R. H. B., restitution of which he now seeks. Said plaintiffs went on and perfected judgment and issued execution. They then instituted the creditors' suit and obtained a judgment therein setting aside the conveyances by R. H. B. and establishing the lien of their attachment upon the property conveyed, and directing the sheriff holding such attachment and execution to proceed and sell the real estate levied upon, or so much thereof as would be necessary to produce the amount due upon the judgment and the costs and expenses of the equity suit in which the present motion was made, which costs were directed to be first paid out of the proceeds of the sale. The judgment then proceeded to direct the sheriff to sell the right, title and interest which R. H. B. had the day the attachment was levied free and discharged of any claim, right, title and interest or lien of the purchaser and others of the defendants in the equity suit. The sheriff sold as commanded by said judgment, and also by virtue of the attachment and execution in the action at law to trustees for the creditors who held the property at the time the motion for restitution was made.

*Held*, That the motion should be granted.

It was claimed by plaintiffs that restitution should not be ordered because the judgment of reversal is not final, and a new trial has been ordered, and there are grounds upon which plaintiff may finally prevail in the action.

*Held*, Untenable; that these considerations were not conclusive.

No conveyance of the property is necessary. All that is required in respect to the real estate is that it be restored to the possession of the purchaser from R. H. B. An accounting should be had in respect to the rents and profits received by the trustees, and the same shall be paid to the purchaser from R. H. B.

Motion for restitution in *Murray v. Burdell* denied, and in *Wallace v. Berdell* granted.

Opinion by *Rapallo, J.* All concur.

#### SURETYSHIP. ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Lewis S. Wheeler et al., ex'rs, v. Robert C. Benedict et al.*

Decided May, 1885.

Where a surety would escape liability by reason of a request to the creditor to sue the principal debtor, he must show that the latter was solvent at the time of the request, and has since become insolvent.

Where the payee and holder of a note past due told the surety that he did not consider him holden upon it, but it did not appear that the surety intended or was able, at the time, to pay the holder, nor that by the holder's statement the surety was prevented or influenced not to pay the holder at that time; nor that if the surety had then paid it he could have then collected the amount of the principal debtor, *Held*, That the holder was not estopped, and could recover of the surety.

The action was by the executor upon a note given his testator by *Benedict & Strong*, defendants, as principals, and defendant *Fulton* as surety. The latter alone de-

fends. The defense was a request by the surety to plaintiff to prosecute the makers and neglect to do so; solvency of the makers when the request was made, and their insolvency afterward. The note was due on March 2, 1879. In May, 1879, *Fulton* asked the testator to collect the note. Proof was given by *Fulton* as to various property which *Strong & Benedict* had in April, 1879, and of the amount of mortgages on the real estate, but no proof was given of the amount of their debts. It was shown that they assigned in March, '81. A witness for the defense also testified that he was with *Fulton* when he saw the testator in Jan., 1880. *Fulton* asked the testator whether he had collected that note upon which he was security. Testator said he had not. *Fulton* asked him if he did not remember that he (*Fulton*) told him last spring that he must collect the note, and that he (*Fulton*) would not stand security on it any longer. Testator said yes; that he went down to see *Benedict*, who said he was perfectly good, and as testator had no use for his money he thought he would let it stand. *Fulton* then said that he supposed he was released as a surety. Testator said yes; that he did not consider *Fulton* holding for it; that he considered *Benedict* perfectly good.

The court directed a verdict for plaintiff.

*T. F. Bush*, for deft.

*Butts & Merritt*, for plff.

*Held*, That the verdict was right.

Where a surety would escape liability by reason of a request to the

creditor to sue the principal debtor, we think he must also show that the principal debtor was solvent and able to pay the debt at the time of the request, and that he has since become insolvent and unable to pay. 67 N. Y., 99. In this case it was not shown that at the time of the request the principal debtor was solvent. It was shown that Benedict & Strong owned property, but it was not shown what debts they owed.

We do not think the conversation in Jan., 1880, an estoppel. There is no evidence that Fulton was then ready to pay the note, or that by the conversation with testator he was deterred from paying it and then collecting its amount from the principal; or that, if he had paid it, he could then have collected the amount from the principal. One element of an estoppel, see 55 N. Y., 334, must be that it has induced or prevented action, from which loss will accrue if a retraction be allowed. Here, then, defendant fails. If testator had not told Fulton that he did not consider him holden there is no presumption that Fulton would then have paid testator and sued Benedict. There was no proof that he was ready to pay, and without payment he could not sue Benedict.

Judgment ordered for plaintiff on verdict.

Opinion by *Learned, P.J.*; *Landon* and *Bockes, JJ.*, concur.

#### DIVORCE. ALIMONY.

N. Y. COURT OF APPEALS.

*Merritt, respt.*, v. *Merritt, applt.*

Vol. 21—No. 15.

Decided May 5, 1885.

The possession of a separate estate by a wife will not deprive the court of the exercise of its discretion on her application, or absolutely bar her right to temporary alimony, but may be considered in measuring the allowance to be made.

This was an appeal from an order of General Term, affirming an order of Special Term which directed the defendant in an action for a limited divorce to pay to his wife, *pendente lite*, temporary alimony and a counsel fee. The record shows that the wife has a separate estate, which is small in amount, and has not been derived from her husband.

*Edward P. Wilder*, for applt.

*Edgar Ketchum*, for respt.

*Held*, The possession of a separate estate by the wife would not deprive the court of the exercise of its discretion upon her application or absolutely bar her right to temporary alimony. It was a fact to be considered by the court in measuring the allowance to be made.

*Collins v. Collins*, 80 N. Y., 1, distinguished.

Order of General Term, affirming order of Special Term, affirmed.

*Per curiam* opinion. All concur.

#### SCHOOLS. COSTS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Martha C. Durfee et al.*, *appls.*, v. *Daniel McCall*, as Trustee of School District No. 26, *respt.*

Decided May, 1885.

D. was hired by H., trustee of a school district, as a teacher. H. gave D. orders

for his salary upon the tax collector, which the latter refused to pay. Defendant succeeded H. in the office. Plaintiffs, assignees of D., recovered against defendant the amount of the orders. The judge certified that it appeared upon the trial that defendant acted in good faith. *Held*, That plaintiffs were entitled to costs; that § 3244, Code Civ. Pro., did not apply, as defendant had not done or omitted anything as to which an appeal lay to the State Superintendent of Public Instruction.

The assignee of plaintiffs, one D., was engaged by H., trustee of the school district, as a teacher. H. gave D. orders on the tax collector for his salary, which the latter refused to pay; why, does not appear. Defendant succeeded H. Plaintiffs brought this action against him, alleging the above facts, and that defendant refused to pay or direct the payment of D.'s salary. They recovered for the orders. The judge certified that it appeared on the trial that defendant acted in good faith. The question is whether plaintiffs are entitled to costs. The Special Term decided that they were not.

*E. A. Spencer*, for appls.

*J. M. & H. Dudley*, for respt.

*Held*, Error. Defendant insists under Code Civ. Pro., § 3244, plaintiffs cannot have costs. We do not think this action one of those described in the section. The question must be decided by the nature of the action as it appears in the pleadings, and not by the certificate of the court as to good faith. One question under § 3244 must be whether defendant has done or refused to do anything here which might have been the subject of an appeal to the State Superintendent.

Chap. 555, Laws of 1864, title 7, § 89, p. 1265, says the collector is to pay out moneys on the order of a majority of the trustees, and is to pay to his successor any moneys in his hands belonging to the district. The trustee, therefore, is not to have the custody of the money. The right to appeal to the State Superintendent is found in title 12 of the same act, p. 1284, § 1, sub. 4. Among other cases it is given to "any person feeling aggrieved by the trustees in refusing to pay a teacher. It cannot be said there was a refusal here, for in giving the order the trustee had done all in his power. The action was brought under Code, § 1927. Section 1931 provides that the amount recovered against a trustee shall be allowed him in his accounts. The allegation of non-payment in the complaint is merely a formal one; no actual refusal of the trustee to perform an official duty is alleged. There was, therefore, no ground for an appeal to the superintendent. Section 3244 does not apply, and plaintiffs are entitled to costs.

Order reversed, with costs, and motion granted, without costs.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs; *Bockes, J.*, dissents.

## ASSESSMENTS.

### N. Y. COURT OF APPEALS.

*Moore et al, exrs., appls., v. The City of Albany, respt.*

Decided March 3, 1885.

Where a portion of a street which is being graded under the direction of the street

commissioner is filled higher than the established grade, but the entire work is afterwards accepted and approved by the common council, *Held*, That the change of grade was thereby ratified and that such ratification was sufficient.

In making the street the contractor made excavations on the slopes outside of the street lines upon private property, and also in filling ravines made embankments on private property outside the street lines, without the express consent of the owners of such property, for the purpose of securing the full width at grade. *Held*, That this would not render the assessment invalid; nor is it invalidated by the fact that the expense of constructing drains through such embankment outside the lines without the knowledge of the owners was included.

*Affirming S. C., 20 W. Dig., 282.*

This action was brought to recover back an assessment paid under protest for grading McCarty Avenue in the City of Albany. Ordinances had been adopted by the common council establishing the grade of the street and ordering it to be excavated, filled and formed so as to conform to the grade established, and providing that the excavating, filling and forming be done to the full width of the street. In pursuance of the ordinances the work was done by contract under the direction and supervision of the street commissioner and city surveyor and was accepted by the city. In the performance of the work a portion of the street was filled higher than the established grade. This increased the expense. The entire work was subsequently accepted by the city and approved by the common council.

*Franklin M. Danaher, for appls.*

*Simon W. Rosendale, for respnt.*

*Held*, That the change of grade was no objection to the assessment; that it was to be inferred from the facts admitted that the change of grade was ratified by the common council by such vote as was required and that such ratification was sufficient, as what the common council could originally have ordained it could subsequently ratify.

It appeared that the street was cut through elevations and that nearly 6,000 yards were excavated on the slopes outside of the street lines upon private property, so as to secure the full width of the street at grade, and such excavation was without the knowledge and express consent of the land owners.

*Held*, That this was clearly a trespass upon private property, but no harm was done to the persons assessed by taking the soil; that the adjoining land owners could not deprive them of the benefit of the improved street. The persons whose soil was taken may, unless debarred in some way by their own acts, sue the city or the persons who took their soil for the trespass, but the assessment cannot on that ground be assailed as invalid, as all the work was for the improvement of the street within the street lines.

It also appeared that where the street passed over ravines there were nearly 26,000 yards of embankment outside of street lines upon the slopes of the street, so as to secure the full width at grade, and such embankment was upon private property without the express consent of the owners. It

appeared that these embankments were not injurious to the adjoining owners, that they had not been objected to, but had been left undisturbed for several years and the assessments on account of them had been paid, and that the construction of these embankments was the most economical way of grading the street; that in case an attempt should be made by the land owners to disturb them there is ample power under the city charter to vest the title to the lands in the city for the purpose of the street. Laws of 1870, Chap. 77, Tit. 7. § 1.

*Held*, That under the circumstances plaintiffs cannot claim that they will not or may not receive any benefit from the street, and they are not in a position to assail the assessment as invalid.

In order to drain water under the embankments, about 500 feet of drains outside of the street lines were constructed upon private property without the knowledge or express consent of the owners thereof. It did not appear that such owners objected. The expense of constructing these drains was included in the assessment.

*Held*, That the assessment was not thereby invalidated.

*People v. Haines*, 49 N. Y., 587; *In re Rhineland*, 68 id., 105; *In re Cheesebrough*, 78 id., 232; *In re Ingraham*, 64 id., 310, distinguished.

After the assessment had been laid C. and another, whose lands had been assessed, commenced an action in the Supreme Court against the city to vacate and re-

move the assessment as a cloud upon title, and they recovered a judgment at the Special Term declaring the assessment null and void for the same reasons now urged by plaintiffs, and vacated the same as to the lands of those plaintiffs.

*Held*, That the plaintiffs here cannot claim the benefit of that judgment as *res adjudicata* or *stare decisis*; that decision having been made by the Special Term, this court was not bound by it, and if it was based upon the facts existing here it was erroneous.

*Chase v. Chase*, 95 N. Y., 373; *Bruecher v. Village of Portchester*, 31 Hun, 550, distinguished.

Judgment of General Term for defendant on case submitted affirmed.

Opinion by *Earl, J.* All concur.

#### REFERENCE. PRACTICE.

##### N. Y. COURT OF APPEALS.

*Little, rec'r., applt., v. Lynch, resp't.*

Decided April 28, 1885.

A tender of his report by a referee within the time limited is not a delivery within § 1019, Code Civ. Pro.

To entitle himself to his fees and keep his report valid in case of an omission of the successful party to take it up the referee must file the same.

Reversing S. C., 20 W. Dig., 375.

This was an appeal from an order of General Term, reversing an order of Special Term setting aside and vacating a judgment entered in the above entitled action upon a report of a referee on the ground that the reference herein had been



terminated before the delivery or filing of said report by a failure to comply with Section 1019 of the Code of Civil Procedure, which requires that a referee's report "must be either filed with the clerk, or delivered to the attorney for one of the parties within sixty days from the time when the cause was finally submitted."

*W. T. B. Milliken*, for applt.

*Abram Kling*, for resp't.

*Held*, That a literal compliance with the requirements of said section was necessary. A tender of the report within the time limited was not a delivery within said section. 84 N. Y., 650.

The acceptance of a reference is a voluntary act; but if the referee accept he must rely for his fees upon the interest of the prevailing party to take up the report, and if he omits to do so, then upon his common law action to recover them, after putting himself in a position to maintain it by filing the report.

*Geib v. Topping*, 83 N. Y., 46, explained.

Order of General Term, reversing order of Special Term setting aside report, reversed, and order of Special Term affirmed.

*Per curiam* opinion. All concur.

#### ASSIGNMENT FOR CREDITORS.

##### N. Y. COURT OF APPEALS.

*In re* accounting of Morgan, assignee. *In re* petition of Harding.

Decided May 5, 1885.

If by inadvertence or mistake any of the

creditors or claimants have received more than their share of the fund the County Court, on the accounting of the assignee, has power and authority to order its restoration so that it may be properly distributed, and to enforce its order.

M., as assignee of F. & C., in distributing the estate, by mistake, paid to S. & M. \$906.25; the Nat. H. Co. Bank being entitled in equity to such sum. An order and citation was issued out of a County Court on the petition of H., on behalf of said bank as creditor, and himself as surety, directing said S. & M. to show cause before that court why the money and trust funds to the amount of \$906.25, belonging to the assigned estate of F. & C., should not be returned to the assignee, to be by him distributed according to the terms of the assignment. The trial was had by the court and a decree was entered directing the payment to the assignee by said S. & M. of said \$906.25, interest and costs.

*Day & Romer*, for applts.

*A. M. Mills*, for resp'ts.

*Held*, No error; that S. & M., by accepting the payment of their claim, and thus dealing with the assignee, became parties to the assignment. Upon the general accounting of the assignee the County Court had jurisdiction over all matters between the parties to the proceeding in reference thereto. It had power to see that the fund was properly administered and that the trust was properly and fully carried out. It had authority to order its proper distribution, and if by inadvertence or mistake any of the parties before it had received more than their share of the fund,

it had power and authority to order that it should be restored so that it might be properly distributed, and to enforce its order. Laws of 1847, Ch. 466, as amended by Chap. 878, Laws of 1878, §§ 22, 25, 26.

Judgment of General Term, affirming decree of County Court, affirmed.

*Per curiam* opinion. All concur.

### DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Charles Burt, *respt.*, v. The Oneida Community, limited, et al., *appls.*

Decided April, 1885.

The County Judge of the county in which the venue of an action in the Supreme Court is laid may order the defendants residing in such county to be examined under § 870 before him.

When an action is brought in good faith to enforce rights to property in which all the parties are interested, and the defendants retain the custody of all the contracts, etc., relating thereto, and plaintiff is without sufficient information to frame his complaint, an examination is proper.

This court will not review the exercise of the discretion of the Judge as to limiting the examination in the order where the examination is to be taken before him and not before a referee.

Appeal from order of Special Term, refusing to vacate or modify an order of the County Judge requiring defendants H. and C. to be examined pursuant to § 870 Code Civ. Pro.

The affidavit on which the county Judge granted the order showed that plaintiff for many years was a member of and has been expelled from an association possessing a large amount of property in

which he claims rights which this action is brought to enforce; that all of the books, contracts and papers relating to the association and the rights of individual members are in the custody and control of defendants, and that plaintiff is without sufficient knowledge of the facts to frame his complaint: that the association was not formed pursuant to any statute, and that afterwards it assumed to transfer all its property to a limited copartnership formed under the statute without plaintiff's assent.

*Forbes, Brown & Tracy*, for *appls.*

*T. K. Fuller*, for *respt.*

*Held*, That the order of the County Judge was properly granted and the moving affidavits disclose no ground for vacating or modifying it.

That an order for an examination under § 870 must be granted by a judge, and cannot be by the court. 77 N. Y., 278. The County Judge of the county in which the venue of an action in the Supreme Court is laid may order the defendants residing within such county to be examined under this section before him. An examination under this section of a part of the defendants may be ordered to enable a plaintiff to prepare his complaint. 29 Hun, 450, 3 Civ. Pro., 98; 64 N. Y., 120. A motion to vacate or modify such an order may be made before the judge granting it or at Special Term, Code §§ 772, 774; and the order determining such a motion is appealable to this court. *Id.* §§ 1347, 1348.

When an action is brought in

good faith to enforce rights to property in which all of the parties to the action are interested, and the defendants retain in their custody all of the contracts, books and papers relating thereto, and the plaintiff is without sufficient information to frame his complaint, an examination is proper. 29 Hun, 450; 59 How. Pr, 321.

When a party to an action is to be examined, the judge who grants the order may, in his discretion, "designate and limit the particular matters as to which he shall be examined." Code, § 873, as amended in 1879. Undoubtedly the discretion of the judge may be reviewed in this court, but no reason is shown in the moving papers why it should be in this case. The examination is not to be taken by a referee, but by the County Judge, who is entirely competent to keep the examination within proper limits and protect the rights of the parties.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Follett, J.; Hardin, P. J., and Boardman, J., concur.*

#### NEGLIGENCE. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Christiana Fitzsimons, resp't., v. The City of Rome, appl't.*

Decided April, 1885.

Where the husband of the plaintiff is a cripple and has been supported by her for years from the avails of a farm which she owns and cares for, and by her work for others, she is entitled in an action for damages for injuries sustained through

defendant's negligence to recover her loss by reason of inability to labor and care for her property and for expenses necessarily incurred by reason of the injuries. In such a case \$1,000 held not to be excessive.

Appeal from judgment entered upon verdict for plaintiff and from order denying motion for a new trial on the minutes made, on the ground that the damages were excessive, and that the verdict was contrary to the evidence.

Action to recover for damages alleged to have been caused by defendant's negligence.

The Common Council of the city having ordered the construction of a sidewalk the city engineer, for the purpose of preparing plans and specifications, made surveys, and to mark the grade dug small pits at certain points.

Plaintiff while walking on this street in the evening some days later stepped into one of these pits, fell and was considerably injured.

The evidence tended to show that plaintiff was without negligence, and that the act of defendant was a negligent one. The jury returned a verdict for \$1,000.

*McMahon & Curtin, for appl't.*

*James Parks, for resp't.*

*Held,* That under the evidence this court could not say that the damages were excessive.

Plaintiff is a married woman who owns a house and an acre of land, occupied by herself and husband, who constitute the family. About eight years before the husband lost the use of his limbs, since which time plaintiff has supported herself and him from the avails of the place and two cows, which she

owns and cares for, and by sewing, knitting, and washing for others. The husband knew and approved of this suit, and testified in behalf of plaintiff. The court held that plaintiff was entitled to recover the expenses incurred and for the time lost by reason of her injury.

*Held*, No error. Under the evidence plaintiff was entitled to recover what she lost by reason of her inability to labor and care for her property, and also for expenses necessarily incurred by reason of the injury. 54 N. Y., 343. Plaintiff was emancipated by the force of circumstances and the presumed assent of her husband.

Defendant has sustained no injury, and is exposed to no hazard by the rule adopted, for the husband having assented to the wife's prosecution of a suit for the recovery of such damages, is estopped from prosecuting a suit in his own behalf for the same damages. 47 Ia., 465; 2 Thomp. on Neg. 1240-1242.

Judgment and order affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## LEGACIES. PERPETUITIES.

### N. Y. COURT OF APPEALS.

*Shipman*, surviving exr., *respt.*,  
v. *Rollins et al*, *appls.*

Decided March 3, 1885.

By testator's will the executors were directed, after the death of the widow, to sell his real estate, divide the proceeds and give certain shares thereof to certain religious associations which were then to

testator's knowledge not incorporated, but which were duly incorporated before the widow's death. *Held*, That the bequests did not vest till the widow's death and the legatees named having been duly incorporated at that time were capable of taking, and that it was sufficient that that they were so described that they could be ascertained and known when the right to receive the legacies existed.

The will directed a certain sum to be invested and portions of the income paid to E. and L., the balance to a charitable institution unless testator's sister should become a widow and then to her. On the death of either her share of the income to be paid to said institution and also the principal on the death of E., L., and said sister. *Held*, That the bequest of the principal was void.

Reversing S. C., 19 W. Dig., 370.

This action was brought to obtain a judicial construction of the will of F. By the second clause of his will he devised to his wife, during her life, certain specified real estate and authorized his executors to sell so much of his real estate not specifically devised as would produce an annuity of \$1,500 to be paid to her during life. After the death of his wife he directed his executors to sell the real estate devised to her and add the proceeds to the amount set apart to produce her annuity, and after paying her debts and funeral expenses and mortgages standing against the testator "then" to divide the balance of said fund into eight equal shares, four of which he gave to certain religious associations which were not incorporated when the will was made, which fact was known to the testator; the language used indicated that he contemplated a future incorporation. After the death of the testator, but before the

death of his widow, said associations were duly incorporated.

*John L. Hill, John E. Parsons, Alfred Roe, J. H. K. Blauvelt, and Charles H. Knox*, for applts.

*S. H. Thayer, W. W. Hoppin, Jr., and Joseph A. Shoudy*, for respts.

*Held*, That the bequests were valid; that they did not vest until the death of the widow, and the legatees named having been duly incorporated were capable of taking. 83 N. Y., 505; 1 Jac. & Walk. Ch. 145; 79 N. Y., 602; 17 id., 561; 43 id., 303.

*Also held*, That it was sufficient that the legatees were so described that they could be ascertained and known when the right to receive the legacies existed. 52 N. Y., 332; 59 id., 434; 43 id., 254.

The will also directed the executors to invest \$9,000 and of the interest received thereon to pay to E. \$200 annually during life, to L. \$200 annually during life. The surplus annual interest was given to a charitable institution named, unless the testator's sister should become a widow, in which case he directed it to be paid to said sister. On the death of E., L. or said sister the testator directed that the annuity granted to the one so dying should be paid to said charitable institution, and when all three shall have died that the principal and interest that shall be due thereon shall be paid to said institution.

*Held*, That the bequest of the principal was void, there being an illegal suspension of the power of alienation. 3 R. S. (7th id.), 2256, §§ 1, 2; id., 2276, §§ 14, 15.

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A former action was brought for the construction of the will in question here in which it was held that the bequest to said charitable institution was valid. Said institution was not a party to that action and no affirmative relief was asked for against it. It had received a portion of the legacy.

*Held*, That the question as to the validity of the bequest to said institution is not *res adjudicata* by reason of the former judgment; that as said judgment was not reciprocal and binding on both parties it could not act as an estoppel. By accepting the result of the determination said institution did not change the relation it occupied to the other parties in interest.

*Also held*, That payments of some portion of the income of the legacy to said institution having been made by the executors in accordance with said former judgment which was obligatory upon them, they should not be called upon to account for the same.

Judgment of General Term, which reversed in part and affirmed in part the judgment of the Special Term, reversed, and judgment of Special Term affirmed, except as to said charitable institution and as to that reversed.

Opinion by *Miller, J.* All concur except *Rapallo*, and *Andrews, JJ.*, not voting.

#### CRIMINAL LAW. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, *respts.* v. Harry T Thompson, *applt.*

Decided April, 1885.

In a criminal action where the evidence of an accomplice has been received, the defendant is entitled to a charge that a conviction cannot be had on the evidence of the accomplice alone and that no conviction could be had on such evidence unless corroborated by such other evidence as tends to connect defendant with the crime, and a refusal to so charge is error calling for a new trial.

Appeal from judgment entered upon conviction of defendant after trial of an indictment charging him with having feloniously removed a dead body from its grave with intent to sell it for purposes of dissection and with having sold it to the medical department of the Syracuse University.

On the 25th of March, 1883, the grave of one H. was found to have been broken open and the body removed. A search being made the body was found in the dissecting room of the college of medicine of the university.

On the trial, Dr. S., the demonstrator of anatomy of the college, identified defendant as the man who, on the morning of March 26, offered to sell the body and who called during the day to get his pay. One H. also testified to admissions and declarations of defendant tending to establish the crime charged. The evidence tended strongly to establish that H. was an accomplice. The statute, 3 R. S., 7th ed., 2511, also provides that any one who shall purchase or receive the dead body of any human being, knowing the same to have been disinterred contrary to the provisions of the statute, shall be punished as pre-

scribed. Defendant's counsel requested a charge that the evidence was insufficient to convict if the evidence of H. was laid aside, to which the court replied that that was for the jury to decide. He then requested the court to charge that "a conviction cannot be had on the evidence of an accomplice alone," which was refused. The court also refused to charge that "a conviction cannot be had upon the uncorroborated evidence of two accomplices" or that "if the jury find that Dr. S. and H. are accomplices in this crime charged, then upon their uncorroborated evidence defendant cannot be convicted."

*W. P. Goodelle*, for applt.

*C. H. Lewis*, Dist. Atty., for respts.

*Held*, Error. Section 399, Code Crim. Pro., introduces a new rule as to an accomplice's evidence. Defendant was entitled to have the court instruct the jury that a conviction could not be had upon the "testimony of an accomplice alone," and that no conviction could take place upon the evidence of an accomplice, "unless corroborated by such other evidence as tends to connect defendant with the commission of the crime." See 29 Hun, 523.

Though it should be conceded that there was "other evidence" which, if believed, tended to connect defendant with the commission of the crime, defendant would be entitled to have this rule prescribed by the statute laid down to the jury. It was for the jury to say whether they should believe

this "other evidence," and if they came to the conclusion not to believe it, or that it was insufficient to remove all reasonable doubt, then this rule of law given by the statute would be pertinent.

We are not prepared to say that the error into which the court fell worked no wrong to defendant and we cannot, therefore, disregard it. 53 N. Y., 183; 32 Hun, 474.

Judgment and conviction reversed and new trial ordered.

Opinion by *Hardin, P.J.*; *Boardman*, and *Follett, J.J.*, concur.

#### CHECKS. GIFT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Melissa Cloyes, *applt.* v. Norman S. Cloyes, *respt.*

Decided April, 1885.

Defendant, on his marriage with plaintiff, placed a check drawn by him among the presents, nothing having been previously said about it. Thereafter plaintiff presented it for payment, which was refused. *Held*, That an action upon the check could not be maintained, as it was without consideration and did not constitute a valid gift.

Appeal from judgment entered on nonsuit.

Action upon a check. The parties to this action were married April 28, 1881, but have separated. On the day of the marriage and before the ceremony defendant drew his check in the ordinary form for \$400, payable to plaintiff, and placed it among the gifts to the bride. Defendant then had funds in bank to meet it. The following morning plaintiff gave it to defendant for safe keeping, and

subsequently, after domestic difficulties had arisen, took it from defendant's vest pocket and in September, 1881, presented it to the bank for payment, which was refused because defendant's account was not then good for that amount.

Plaintiff testified that she first saw the check that evening after the marriage; that she had no talk with defendant about it before the marriage; that she knew nothing about it before that time; that it was a surprise to her. Defendant testified that it was given without consideration, which was not disputed.

The court granted a nonsuit.

*Brown & Mitchell*, for *applt.*

*William Kernan*, for *respt.*

*Held*, No error. In an action by the payee of a dishonored check against the drawer it is presumed that the check was given upon a sufficient consideration. 3 Johns. Cas., 259; 2 Dan. Neg. Ins., §§ 1646-1652. But this presumption is rebuttable, and in this case the presumption was so effectually overthrown that the existence of a consideration was not a question of fact for the jury. The evidence does not warrant the conclusion that the marriage was in consideration of the check, or that the check was given in consideration of the marriage. A subsisting contract to marry is not a legal consideration for new contracts afterwards entered into between the parties, unless the new contract formed part of the consideration for the contract to marry. 10 Conn., 479. When the

check was delivered the agreement to marry was a valid and subsisting contract.

The action cannot be maintained upon the theory that the check was a valid gift. The word gift signifies an actual transfer *in presenti* of property without consideration. The check did not transfer *in presenti* to the payee \$400, or any part of the funds standing to the credit of the drawer upon the books of the drawee. 71 N. Y., 325; 91 id., 20; 10 Wall., 152. No specific property was transferred by defendant to plaintiff. It was a naked promise. The check being without consideration, this action cannot be sustained. 3 N. Y., 93; 10 Conn., 479; L. R., 1 Ch. App. Cas., 25; 107 U. S., 602; Byles on Bills, 13 ed., 126. There is a broad distinction between the gift of the check or obligation of a third person and a gift of the donor's promise to pay. Byles on Bills, 13 ed., 126.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Boardman, J.*, concurs.

#### FORGERY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respts.*, v. William Bassford, *applt.*

Decided April, 1885.

The acquittal of one of several persons indicted for forgery is no legal interruption to the conviction of another of them.

It is competent to prove that defendant was on other occasions connected with the other persons indicted, in the same business as that in which the alleged forgery was committed.

Acts and declarations of any one conspirator, even in the absence of the others, are competent evidence as against any of them.

It is competent to prove that defendant tried to fabricate evidence for his defense.

Appeal from judgment at Sessions, and from orders denying motions in arrest of judgment and for new trial.

Defendant was indicted jointly with two others, K. and P., for forgery in second degree, for forging and altering a promissory note. He was tried alone in Court of Sessions, found guilty and sentenced to imprisonment for five years. The note purported to be made by one W., dated Oct. 25, 1883, for \$200, payable to K.'s order in six months. The evidence tends to show that on the day of its date the three indicted parties together went from Buffalo with a wagon containing a fanning-mill to W.'s farm, and found him at work in the field, and asked him to become agent to sell fanning-mills; and at their request he left the field and went with them to his barn. Defendant shortly left the barn and returned to the field, and P. produced papers, did some writing, and asked W. to sign. One paper was an agreement by W. to pay K. certain profits on sales, etc., and the other purported to transfer to W. the interest of K. in letters patent on the mills. The papers were signed by W. and K. W. did not read them, nor were they read to him, and he signed no note, and there was no talk of any note. The evidence tended to prove that W.'s name subscribed to the note was not his signature. Five days later,



defendant, at his saloon in Buffalo, told one E. that he could buy a note for \$200 made by W. at an advantage, telling him it was perfectly good; that it was given for a threshing machine, and he introduced E. to K. as the person having it, and K. produced the note, and offered to sell it at a discount to E., who desiring to be satisfied of its genuineness, K. referred to defendant as one who "knew all about it." The latter said, "Yes, I sat right by the old man when he signed his name." Thereupon E. bought the note at a discount. K. then asked defendant how much he owed him, and there was some talk of an account between them, and defendant received some of the proceeds of the sale, ostensibly on account of money due him from K. E. immediately advised W. that he held his note, and proceedings were shortly afterward taken against the persons afterward indicted. Defendant was out with K. and P. when they had another transaction about the fanning-mill patent with other parties, but there is no direct evidence that he was pecuniarily interested in the business. Defendant testified he was not present when the papers were signed, had nothing to do with the transaction, had no reason to suppose the note was forged, and he helped negotiate the sale of it to get payment of K.'s debt to him. P. had been tried upon the indictment and acquitted.

*H. T. Swift*, for applt.

*Geo. T. Quimby*, for respts.

*Held*, That the evidence justified the conclusion that the note was

forged, and that it was the result of a common purpose of or conspiracy between defendant, K. and P., of which the sale of the note was the consummation. 1 N.Y. Cr., 123. The acquittal of P. was no legal interruption to the conviction and judgment. Penal Code, §§ 29, 32.

It was legitimate to prove that defendant on other occasions, before or after the transaction in question, participated with K. and P. in the same business, to show that he had some relation to and interest with them which could not well be shown in any other way. The evidence did not tend to prove the commission of any other crime; and if it had, it may not have been incompetent in view of its purpose before mentioned. 3 Hun, 40, *affd.*, 60 N. Y., 616; 79 *id.*, 424, *affg.* 18 Hun, 239; 82 N. Y., 340. Evidence of acts and declarations of any one of the conspirators relating to the matter in question was competent although in the absence of the others, and the act of one in the same common object and purpose became that of all and each of them. 1 Phillips Ev., (C. & H. ed.) 95; 6 T. R., 527; 2 Peters, 358; 8 C. & P., 297; 2 Hall, 277; 40 N. Y., 221; 72 *id.*, 70. This relation is assumed by a person whenever he concurs in the plans and aids in their execution, although it is after the formation of the conspiracy. 4 Wend., 229. It may be inferred from circumstances. 7 Cow., 445.

It was competent to prove that defendant had tried to fabricate evidence for his defense, or had

used illegitimate means and artifices to escape the consequences of the crime with which he was charged. Whart. Cr. L., §§ 714, 715, 716, *et seq.*; Benn's Rep., Webster Case, 210; S. C., 5 Cush, 295; 1 Williams, 274; 12 Bush, 271; 15 Mich., 297.

Judgment and orders affirmed.

Opinion by *Bradley, J.*; *Barker, Haight and Corlett, JJ.*, concur.

### EMINENT DOMAIN. ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*In re* application of the N. Y., W. S. & B. RR. Co., *respt.*, to acquire lands of Elizabeth Hart et al., *appls.*

Decided April, 1885.

One of the commissioners in condemnation proceedings was proposed by appellants and selected on their suggestion. After hearing and report it was discovered that the commissioner was not a freeholder. *Held*, That it was then too late for appellants to object to the commissioner's qualification.

Appeal from Special Term order confirming commissioners' report in proceedings to acquire lands for petitioner's road.

One of the appellants is a minor, and appeared by guardian *ad litem*. One of the commissioners, W., was proposed by the attorney for one of the appellants with the consent of all the others. Until after hearing was had and the commissioners' report was made none of the attorneys knew that W. was not a freeholder. That fact being afterward ascertained, on the hearing of application for confirmation, it

was on that ground opposed, and motion made by appellants E. and G. to so correct the order appointing commissioners as to make that fact appear in its recital. The motion was denied and the report confirmed. Appellants E. and G. appeal from both branches of the order. The minor appeals from the order of confirmation only. The notices in terms express no appeal from the appraisal and report. So far as appears W. was unobjectionable on any other ground than the one urged, and the minor's interests were not prejudiced.

*Stephen Lockwood*, for *appls.* E. and G.

*Warren F. Miller*, for infant *applt.*

*Ansley Wilcox*, for *respt.*

*Held*, The appeal from the order of confirmation may bring here for review anything involved which would not necessarily come within an appeal from the report and appraisal. The question of the commissioner's qualification does not appear to have been raised at Special Term on the minor's behalf. Although his infancy requires the court to see that his interests were not prejudiced, yet in doing so reference must be had to his substantial rights. It fairly appears that his rights were not prejudiced, and the irregularity was such as might be waived by a party of full age by omission to raise the question at the proper time. Therefore the proceedings will not be set aside as to the infant. 3 Pom. Eq., § 1307; 22 Barb., 168; 49 N. Y., 227; 53 id., 322. The point was, however, dis-

tinctly raised by the other appellants at Special Term. But no inquiry was made by them, nor were they misled in the matter. It was mere want of information which might have been obtained before the commissioners were appointed, or before the hearing was had. Waiver may be implied from appellants' omission to object when the occasion gave opportunity. 24 Wend., 258; 1 Den., 440; 34 Barb., 481; 51 How., 451; 18 Pa. St., 233; 3 Cush., 1; 121 Mass., 93; 8 B. & C., 417; 60 Md., 215; 45 Am., 722. Their right to object was waived and gone after the hearing was had and the report made.

Order affirmed.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

#### MORTGAGEE IN POSSESSION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Prudence M. Wing, *applt.*, v. Ambrose S. Field, *respt.*

Decided April, 1885.

Under the facts appearing in the opinion, *Held*, That defendant is mortgagee in possession, and his rights are unaffected by foreclosure of subsequent mortgage.

Appeal from judgment at circuit. Ejectment. In 1855 A. mortgaged certain premises of his to B. The mortgage was recorded, and A., in 1869, conveyed a portion of said premises to C., who executed to his grantor a mortgage of the premises with power of sale and went into possession. These last instruments were recorded. In the next October A. assigned the latter mortgage to D., and B. as-

signed the first-mentioned one to E., who in April, 1872, began foreclosure of it. C. was not made a party to that action, nor was summons served on D., and he did not appear in the action. Judgment of foreclosure and sale was recovered, the entire mortgaged premises were sold to defendant, producing a surplus, and the referee gave him a deed August 20, 1872, covering the premises in question, and defendant went into possession of all the land except that portion mentioned in the complaint, of which C. remained in possession until Feb., 1880, when he surrendered possession to defendant, who has since been in possession. In Jan., 1880, D. began by advertisement to foreclose the mortgage given by C.; sale was had in April, 1880, and plaintiff became the purchaser. Notice of that proceeding was served on defendant and he was present at the sale, and there publicly announced that he claimed title and right to possession of the premises then sold. The court decided that plaintiff had an estate in fee simple in the premises described in the complaint; that defendant had the position of mortgagee in possession, and that plaintiff was not entitled to recover. Judgment was entered for defendant.

*H. R. Durfee*, for *applt.*

*Vanderberg & Saxton*, for *respt.*

*Held*, That the mortgage made by A. was extinguished by the foreclosure and sale only so far as no beneficial interest existed for keeping the legal and equitable estates distinct, but remained ef-

factual to acquire or quiet the un-foreclosed interests in the premises subsequent to it, or to require redemption by way of relief for those having such interests or liens not barred by the foreclosure and sale. 42 Barb., 356; 22 Hun, 527; 4 Paige, 526. Had the assignee of the mortgage who was plaintiff in that foreclosure action been the purchaser at the sale, and gone into possession by consent of C. prior to foreclosure of the D. mortgage, he would have been deemed a mortgagee in possession and could have held it as against plaintiff, and her only remedy would have been by redemption. 17 Barb., 100. Defendant acquired as purchaser the rights of the mortgagee in so far as the mortgage as distinguished from the judgment and sale was requisite to preserve and protect any rights afforded by it. 7 Cow., 9; 10 N. Y., 356; 17 id., 288; 25 id., 320; 66 id., 176; 42 id., 366; 26 Hun, 635. Defendant had the relation of mortgagee in possession and all the rights incident to it. The equity of redemption remained in C. until the sale to plaintiff on foreclosure of the subsequent mortgage, and was thereafter in her. See 15 Wend., 248; 14 id., 236; 17 Barb., 100; 73 N. Y., 82.

*Watson v. Spence*, 20 Wend., 260, and *Shriver v. Shriver*, 86 N. Y., 580, distinguished.

The proceedings to foreclose the subsequent mortgage did not affect defendant's rights. 2 R. S., 546, § 8; 6 Hill, 65; 9 N. Y., 502; 23 Hun, 134; 55 N. Y., 463.

Judgment affirmed.

Opinion by *Bradley, J.*; *Barker, Haight* and *Corlett, JJ.*, concur.

### SALE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Alvin D. Puffer, applt.*, v. *Walter F. Reeve, respt.*

Decided March 27, 1885.

Plaintiff delivered to one B. a soda water apparatus, and took from him the following instrument: Know all men by these presents, that I., B., have hired, leased and received of A. B. Puffer for the following term \* \* \* subject to the conditions herein stated, the following described goods and chattels \* \* \* And I do promise and agree to pay him for the possession and reasonable use thereof for said term the sum of \$1,152, as rent to be paid, old apparatus \$452, balance in installments set forth in the several notes given by me as follows: " \* \* And upon the full payment of the several notes aforesaid, all claim and title to said property on the part of said Puffer shall cease, and the whole title shall vest in said lessee as owner. But upon any breach of the provisions of this lease, especially upon failure to pay the several notes, or either of them, as they become due and payable, then this lease and any and all claim or right on the part of said lessee under the same, or to the further use and possession of said property, shall be thereby terminated, and the said A. D. Puffer may thereafter enter the premises where the said property may be and resume possession of the same without process of law or let or hindrance from the lessee. In an action brought by Puffer after default in payment of the notes to recover possession of the apparatus from a *bona fide* purchaser of the same from B. without notice of the above instrument, *Held*, That he was entitled to recover.

Appeal from judgment recovered on trial without a jury.

The plaintiff delivered to one B.

a soda-water apparatus and took from B. the following instrument:

"Know all men by these presents, that I, B., have hired, leased and received of A. D. Puffer for the following term \* \* \* subject to the conditions herein stated, the following described goods and chattels \* \* \* And I do promise and agree to pay him for the possession and reasonable use thereof for said term the sum of \$1,152, as rent, to be paid, old apparatus \$452, balance in installments set forth in these several notes given by me as follows: \* \* \* And upon the full payment of the several notes aforesaid, all claim and title to said property on the part of said Puffer shall cease and the whole title shall vest in said lessee as owner. But upon any breach of the provisions of this lease, especially upon failure to pay the several notes, or either of them, as they become due and payable, then this lease and any and all claims or right upon the part of said lessee under the same, or to the further use and possession of said property, shall be thereby terminated, and the said A. D. Puffer may thereafter enter the premises where the said property may be and resume possession of the same without process of law or let or hindrance from the lessee."

B. subsequently made default in the payment of the notes specified in the above instrument, and Puffer thereafter commenced this action to recover possession of the apparatus from defendant, who had acquired possession of the same through a series of transfers from B., and who was a *bona fide*

purchaser thereof without notice of the agreement between B. and the plaintiff.

*A. Steckler*, for applt.

*A. Simis, Jr.*, for respt.

*Held*, That the delivery of the property by plaintiff was not alone conditional, as it was in 77 N. Y., 391, but the title itself was conditional on the final and complete payment to be made by the purchaser. That the transaction was no more than a conditional sale, the title remaining in plaintiff until complete payment should extinguish the condition. That such payment never was made, and the default entitled plaintiff to recover the possession of the property under the authority of 40 N. Y., 314, and 46 id., 500.

Judgment reversed and new trial ordered.

Opinions by *Davis, P.J.*, and *Daniels, J.*; *Brady, J.*, dissents, holding that the judgment should be affirmed under the authority of 27 Hun, 497, and 77 N. Y., 391.

#### AGREEMENT IN RESTRAINT OF TRADE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Diamond Match Company, *respt.*, v. Wm. Roeber, *applt.*

Decided March 4, 1885.

It is no longer the rule that an agreement in restraint of trade cannot transcend the boundaries of the state in which it may be made.

The reason upon which the principle has been maintained by which a person was permitted to bind himself not to engage in a competing business within a prescribed locality authorizes and sanctions its ex-

tension in an equal degree, and renders it applicable to the enlarged bounds prescribed for modern business transactions, and accordingly only such restraints upon trade are invalid as violating public policy as are unnatural and unreasonable, and not required by the parties for their protection in the ordinary and legitimate course of their dealings.

An extra allowance cannot be granted under § 8253 of the Code of Civ. Pro. in an action to restrain defendant from carrying on a certain business in violation of a contract not to do so entered into by him with plaintiff.

Appeal from a judgment recovered on trial at the Special Term, and from an order directing an additional allowance of costs.

This action was brought by plaintiff, as the successor of the Swift & Courtney & Beecher Co., to perpetually enjoin defendant from violating an agreement entered into by him with the Swift, Courtney & Beecher Co. and its successors to refrain from manufacturing or selling friction matches within the U. S. except in the State of Nevada and the Territory of Montana, either on his own account or in conjunction with or as agent for, etc., any other person, and by the judgment appealed from he was so perpetually enjoined.

The principal defense to the action was that the agreement was invalid as being such a restraint of trade as violated public policy. It appeared upon the trial that the business of the plaintiff extended throughout the U. S., and that previous to the making of the contract defendant carried on an extended business of the same nature, which had been bought up by plaintiff's predecessor.

*Robert Sewell*, for applt.

*Edward Patterson*, for resp't.

*Held*, That the rule embodied in the cases of *Chappel v. Brockway*, 21 Wend., 157; *Dunlop v. Gregory*, 10 N. Y., 241, and *Lawrence v. Kidder*, 10 Barb., 641, that an agreement in restraint of trade could not in any event transcend the bounds of the state in which it should be made was no longer in force.

That when said rule was adopted traffic and trade were ordinarily confined to limited localities, and it was an entirely proper one therefore for that state of business affairs. But since that time business and commercial transactions have transcended the bounds to which they were then subjected and have extended over nearly limitless ranges of country, thus making it necessary that the legal principles previously observed should in like manner be enlarged, extended and applied.

That the reason upon which the principle has been maintained by which a person was permitted to bind himself not to engage in a competing business within a prescribed locality authorizes and sanctions its extension in an equal degree and renders it applicable to the enlarged bounds prescribed for modern business transactions, and that accordingly only such restraints upon trade are invalid as violating public policy as are unnatural and unreasonable, and not required by the parties for their protection in the ordinary and legitimate course of their dealings. L. R., 4 App. Cases, 674, 686; 27

Mich., 15, 19; 47 Iowa, 137; L. R., 14 Ch. Div., 351, 363; 103 Mass., 73; L. R., 9 Eq., 345; L. R., 15 Eq., 59, 65; L. R., 19 Eq., 462; 1 Pick., 143; 20 Wall., 64.

That the contract in question was not of an arbitrary character, and the restraints imposed by it upon defendant were no broader than the business of plaintiff required that they should be, and no broader than the courts have sanctioned in some of the above cited cases, and the contract was not, therefore, illegal.

That there was no basis supplied by the case for the order directing an additional allowance. 92 N. Y., 401; 95 N. Y., 666.

Judgment affirmed and order reversed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs; *Brady, J.*, concurs in the result.

### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Melville Manufacturing Co., *applt.*, v. John F. Salter, *impl'd*, *respt.*

Decided March 27, 1885.

In an action brought to enforce the liability of defendant as the acceptor of a draft or bill of exchange drawn upon him when the answer, without either generally or specifically denying the acceptance of the draft, admits the acceptance of a draft similar to the one set forth in the complaint, but alleges that it was without consideration, such acceptance need not be proved by plaintiff.

Appeal from a judgment recovered on the report of a referee.

The action so far as it was against

defendant Salter was brought to enforce his liability as the acceptor of a draft or bill of exchange drawn upon him. Its presentation to and acceptance by him was alleged in the complaint, and by his answer, without either generally or specifically denying either of the said allegations of the complaint, he admitted "the acceptance of a draft similar to the one set forth in the complaint," but alleged that there was no consideration therefor. Plaintiff did not prove the acceptance of the draft by Salter, and because of that omission the referee determined the action in the latter's favor.

*Charles M. Hall*, for *applt.*

*J. Homer Hildreth*, for *respt.*

*Held*, Error. That the result of the omission of the answer to deny either generally or specifically what was alleged in the complaint was in effect to admit said allegations, and the failure to deny the acceptance of the draft, together with the statement admitting the acceptance of a similar draft, was all that could be required to establish the fact of the acceptance, and it was not necessary, therefore, to prove it.

Judgment reversed and new trial ordered.

Opinion *per curiam*.

### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Highland Weed, *adm'r*, *respt.*, v. Alonzo Hornby and Irene Hornby, *impl'd*, *appls.*

Decided April, 1885.

A. gave a bond to his father, conditioned to pay him interest on a certain sum for his life, and then to his widow for her life, and at her death to pay the principal to the father's executor. The father having died, the obligor gave a mortgage to secure performance of the bond, and the obligee's wife died when a part of the interest due her was unpaid. *Held*, That the widow's administrator had a right to look to the mortgage for the unpaid interest, and the obligee's executor having declined to enforce the security, the administrator had a right to bring suit on the mortgage and join the executor as defendant. So far as the executor had paid the liens upon the mortgaged premises which it was the mortgagor's duty to pay, he was entitled to repayment out of the proceeds of the mortgage sale; but he was not entitled to such reimbursement for taxes paid on the whole premises, whereas the mortgage covered only an undivided half thereof.

Appeal from judgment on referee's report.

Defendant Robert Payne made to his father his bond conditioned to pay semi-annually to him during his life, and after his death to his wife, surviving him, during her life, or until she remarried, the interest on \$1,500, and then the principal to his executors or administrators. The father died leaving his wife surviving him, and a will by which he appointed defendant Whiting executor, to whom letters testamentary were issued. The obligor and his wife then made to the executor a mortgage on the premises in question to secure performance of the unexecuted condition of the bond. The widow died unmarried in July, 1880, and there was then remaining due to her \$858 of the interest on the bond. Letters of administration on her estate were issued to plaintiff, who

requested Whiting to proceed to collect the moneys secured by the bond and mortgage and which were due to his intestate at her death, which Whiting declined to do. Plaintiff then brought this action to foreclose the mortgage, asking that out of the proceeds of the sale he be paid the amount so due his intestate, and the executor be paid the principal sum, etc. Defendant Alonzo Hornby had bought the premises on foreclosure sale of a subsequent mortgage, and Irene was his wife. They two alone defend. Judgment was recovered as prayed.

*Ellsworth & Potter*, for applts.

*Wm. Porter*, for resp't.

*Held*, That plaintiff had the right to have the mortgage security enforced and avail himself of it to collect the money as administrator of the widow. 1 R. S., 737, § 133; 33 Hun, 611. He also had the right to bring this action, joining the executor as defendant. 11 N. Y., 237; 72 id., 70; 51 How., 177; 69 id., 154.

Testimony of Robert Payne, offering to prove his letters with inclosures sent to plaintiff's intestate, and letters received by him from her, was properly excluded. Code Civ. Pro., § 829; 79 N. Y., 415.

So far as Whiting paid taxes which were liens on the mortgaged premises, and which it was the duty of the mortgagor or those holding the legal title under him to pay, it will be assumed he paid them to protect the security held by him, and he was entitled to repayment out of the proceeds of the sale. 4 Johns. Ch., 370; 1 Hopk. Ch., 283; 2



Edw. Ch., 631; 3 Wend., 412; 7 How., 398; 9 Abb. N. C., 372, § 6; 60 How., 438; 78 N. Y., 414; 90 id., 257. But the mortgage in question covered only one undivided half of the premises described in the complaint, and defendant Robert Payne owned such undivided half as tenant in common with another when he gave the mortgage in suit, and the one subsequently given to defendant Alonzo under which the latter took title to such half only as tenant in common. The evidence is that the taxes so paid by Whiting were liens on the whole premises. It cannot be presumed that the amount so paid was only one-half of the taxes on the whole premises. It was error to charge the entire tax so paid on the proceeds of sale.

Judgment reversed, and new trial ordered, costs to abide event, unless plaintiff stipulates to deduct one-half of the amount allowed for taxes paid, as of the date of the judgment, from the amount by it directed to be paid to defendant Whiting for taxes, etc. If so stipulated, the judgment, so modified, affirmed, with costs.

Opinion by *Bradley, J.; Barker* and *Haight, JJ.*, concur.

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Laura LeC. De Caumont, *exrx.*, *applt.*, v. Mary J. Morgan, individually and as *exrx.* et al., *respt.*

Decided May 8, 1885.

The complaint alleged that one M. was, in his lifetime, the owner of 49,940 shares of the

stock of a certain corporation; that by his will he directed his property to be divided as provided by the laws of the State of N. Y. in cases of intestacy; that plaintiffs were his next of kin, and as such entitled to a share of his estate; that after his death defendants were each found to be possessed of a certificate of the said stock representing in the aggregate thirty-two thousand shares, which they claimed to have received from the testator before his decease; that plaintiffs had no knowledge or information sufficient to form a belief as to whether defendants became possessed of said certificates before or after his decease, but that if they acquired them prior thereto it must have been by undue influence, and demanded judgment in effect that the shares so held by defendants should be divided among the next of kin, as provided by the will. *Held*, That the complaint presented no cause of action and that there was a misjoinder of plaintiffs and defendants, and that separate actions should have been brought.

Appeal from judgment of Special Term sustaining demurrers to the complaint.

The complaint alleged that one M. was, in his lifetime, the owner of 49,940 shares of the stock of Morgan's Louisiana & Texas Railroad & Steamship Co.; that he died leaving a will whereby he directed his property to be divided according to the laws of the State of N. Y. in cases of intestacy; that plaintiffs were his next of kin and as such entitled to a share of his estate; that after his death each of the defendants were found to be possessed of a certificate of certain shares of the said stock, amounting in the aggregate to 32,000 shares, which they claimed to have received from testator before his decease; that plaintiffs had no knowledge or information sufficient to form a

belief as to whether defendants became possessed of said certificates before or after his decease, but that if they acquired them prior thereto, it must have been by undue influence. The object of the action, as expressed in the demand for judgment, was to get possession of these various certificates and distribute the shares among the next of kin, dividing them according to the laws of the State of N. Y. Defendants demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that there was a misjoinder of parties plaintiff and defendant.

*John E. Parsons*, for applt.

*F. N. Bangs*, for respts.

*Held*, That the allegation that plaintiffs had no knowledge or information sufficient to form a belief as to whether defendants became possessed of the certificates before or after the death of the testator presented no cause of action, and no material issue could be joined upon it.

That the allegation, that if the shares were transferred during the lifetime of the testator it must have been by undue influence practiced upon him, was void of any direct allegation that undue influence was wrongfully practiced; it was stated, if at all, only by way of inference hypothetically, and it was not therefore an allegation which required defendant to answer.

That there was a misjoinder of parties plaintiff and defendant. That neither of the defendants had any interest whatever in any of the certificates held by any other

defendant, and neither one of them should be obliged to appear in the litigation as to the whole, there being no charge of collusion or unlawful combination.

That plaintiffs claimed a separate and independent interest in each parcel, and if they had any cause of action it would seem to be a separate one and founded upon a separate wrong.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P.J.*, and *Daniels, J.*, concur.

#### ATTORNEY AND CLIENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Julius Forstmann et al., appls., v. Ruth A. Schulting, ex'rx., respt.*

Decided March 27, 1885.

When it is agreed between plaintiffs in an action and their attorney that the latter is to receive one-tenth of the recovery together with the costs and allowances, he has the right to prosecute the action to secure his compensation, and he cannot be deprived of this right by an agreement with defendant, entered into by plaintiffs without his consent, not to further prosecute the same.

It is not necessary for the attorney in such a case to procure leave of the court to continue the prosecution of the action.

Appeal from order staying plaintiff's proceedings.

The plaintiffs in this action agreed with their attorney that he should receive a retainer of \$250 and one-tenth of the recovery, together with the costs and allowances in the action.

A judgment was entered in the action dismissing the complaint and for costs against plaintiffs. These costs were paid by them and

at the same time they agreed not to proceed any further in the case.

Plaintiffs' attorney refused to acquiesce in this arrangement and continued to prosecute the action. An order staying proceedings was then procured by defendant upon the ground that the attorney was prosecuting the action without authority.

*William Watson*, for applts.

*C. Bainbridge Smith*, for resp't.

*Held*, That the agreement not to continue the prosecution of the action was without consideration and was not binding upon plaintiffs or their attorney.

That the attorney had the right to continue the prosecution of the action for the purpose of securing his compensation under his agreement with plaintiffs, and they could not deprive him of that right by the agreement which was made.

That it was not necessary for him to procure leave of the court before proceeding with the prosecution of the action. 24 Hun, 24; 10 W. Dig., 271.

*Goddard v. Trenbath*, 24 Hun, 182, not followed.

Order reversed.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs.

### EQUITY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Ann Maria Deen, applt.*, v. *William Milne, ex'r, resp't.*

Decided March 27, 1885.

When during the trial of an action in the Supreme Court a stipulation is entered into between the parties for the discontinuance

of two actions in another court between the same parties and for the cancellation of a judgment entered in one of them, and such stipulation is entered in the minutes of the proceedings, and is also embodied in writing and signed by the counsel, and this writing is subsequently lost, an action may be maintained in the Supreme Court to establish its existence, and such remedy is concurrent with that by motion in the other court for a discontinuance of the action pending therein.

Appeal from judgment dismissing the complaint, and from order denying motion for new trial.

The object of this action was to establish the existence of a lost stipulation providing for the discontinuance of two actions in the Marine Court brought to recover rent due under a lease, and for the cancellation of a judgment entered in one of them. It appeared that the stipulation in question was made during the trial of an action in the Supreme Court for the cancellation of the lease and to restrain the prosecution of the actions for rent in the Marine Court, and that such stipulation was entered upon the minutes of the trial, and was also reduced to writing and signed by the counsel for the respective parties.

The complaint was dismissed, upon the ground that the object of the action could be accomplished by a motion in the Marine Court, and that therefore the action could not be maintained.

*Joseph A. Shoudy*, for applt.

*Gray & Davenport*, for resp't.

*Held*, That the remedies were concurrent, particularly in a case where the stipulation was made under such circumstances as the

one in this case. That, if there were any doubt, it would be whether the Marine Court would entertain a motion based upon the stipulation.

Judgment reversed and new trial ordered.

Opinion *per curiam*.

### SLANDER. PRIVILEGE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Louise Decker, *respt.*, v. Joel Gaylord et al., *ex'rs.*, *appls.*

Decided April, 1885.

Communications by a resident of a school district to the school commissioner relative to the moral character of the school teacher in that district are qualifiedly privileged. It was error to refuse to charge the jury that if defendant went to the commissioner and in good faith stated what he believed to be true about plaintiff it was a privileged communication.

Appeal from judgment against defendants' testator on verdict at circuit, and from order denying motion for new trial.

Slander. Plaintiff was teaching school in the district where defendants' testator resided. The slanderous words were spoken by the testator in an interview and communication by him with the school commissioner in whose official district the school district was embraced, and the evidence tended to prove that the language was such as to impute unchastity to plaintiff, and to afford her a cause of action if false and not privileged. Code Civ. Pro., § 1906. The main question arises on the exception to the court's refusal to charge "that if defendant, believing that he was

trustee of the district, went to the commissioner and in good faith stated what he believed to be true about plaintiff, it was a privileged communication."

*A. C. Calkins*, for *appls.*

*Adelbert Moot*, for *respt.*

*Held*, That the commissioner was a proper person to receive information of the moral character of the teacher. It was his duty to examine charges in that respect. Laws 1864, Chap. 555, Tit. 2, § 13, subd. 7.

Defendants' testator was lawfully permitted in good faith and in proper manner to communicate to the commissioner the conduct and moral character of the teacher, and to state what he honestly believed to be the truth, and his good faith is presumed; and his liability to the aggrieved party depends on actual malice, which plaintiff must prove. Falsity of the charge is not enough to raise inference of malice. 16 N. Y., 369; 30 *id.*, 20; 37 *id.*, 477; L. R., 4 P. C., 439; 4 Moak's Eng. R., 138; L. R., 4 P. C., 495; 4 Moak's Eng. R., 162; 4 Hun, 389.

Nor is the alleged truth of the charge in the answer by way of justification evidence of malice, although the charge be untrue. 7 Ad. & Ell., N. S., 68; 46 N. Y., 428. Attendant circumstances may furnish evidence of malice. 11 Ad. & Ell., 380; 3 Ad. & Ell., N. S., 5; 15 C. B., N. S., 422. It is difficult to lay down any rule of limitation to extrinsic evidence admissible to prove malice. Odgers Sland., 271. This case is one of qualified privilege. Malice must be proved. If the

words were untrue plaintiff need not prove want of probable cause. 21 Wend., 319.

Whether the testator believed himself to be trustee has no importance, and the request to charge may be treated as if it did not contain any reference to that fact. Malice was by no means conclusively established; the court had not covered the proposition of the request in his charge, nor did he instruct the jury that if they found the words were spoken as claimed and proved by plaintiff, they were in any event privileged if not true. The testator was entitled to the instruction requested. 24 Hun, 395; 23 Wend., 26; 12 Pick., 163; 6 Gray, 94; 105 Mass., 394; 12 Wend., 545; 15 Barb., 105; 15 C.B., N. S., 392; L. R., 5 Q. B., 102. See also 4 Hun, 389; 51 Vt., 501; 31 Am. R., 698; 13 Allen, 239; 1 Denio, 493; 16 Ad. & Ell., 308; 30 N. Y., 20; 10 C. B., 583; 13 id., 333.

Judgment and order reversed. The original defendant having died no new trial can be had, nor can defendants have costs.

Opinion by *Bradley, J.*; *Barker, J.*, concurs; *Haight, J.*, not sitting.

## APPEAL. UNDERTAKING.

N. Y. COURT OF APPEALS.

*Mahon, respt.*, v. *Noon, applt.*

Decided April 21, 1885.

Where an appellant has little or no property and one of the sureties on his undertaking becomes insolvent, and the other is not of much financial ability, the respondent is entitled to a new undertaking.

This was a motion to compel the  
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appellant within ten days to file and serve a new undertaking on his appeal in the form and manner required by the Code, and that in default thereof the appeal be dismissed.

It appeared that F., one of the sureties, was solvent when he signed the undertaking, but is now worth nothing and in the penitentiary under sentence for a felony. C., the other surety, was shown to be as good financially as when he justified, but he does not appear to be a person of much financial ability. The appellant was shown to have little or no property.

*P. Keady*, for motion.

*I. J. Morrison*, opposed.

*Held*, That the respondent is entitled to a new undertaking, either with two new sureties or with C. and a new surety.

Motion granted.

*Per curiam* opinion. All concur.

## RAILROADS. FENCES.

N. Y. COURT OF APPEALS.

*Knight, respt.*, v. *The N. Y., L. E. & W. RR. Co., applt.*

Decided April 14, 1885.

By an omission to build and maintain fences on the sides of its road a railroad company does not become liable for injuries which cattle or horses may do to themselves by straying on the track.

Reversing S. C., 18 W. Dig., 214.

This action was brought to recover damages for a colt belonging to plaintiff, alleged to have been killed through defendant's negligence. It appeared that plaintiff turned his horse and the colt in question, which was three years

old, into the highway on which his barns stood, in order that they might go to a trough in a neighboring field to drink. After drinking they returned to the barn yard, but, the gate being open, the colt ran out again and the horse followed, and both ran down the highway toward a canal. Plaintiff pursued them and they turned into the path along the canal and ran on the railroad track through a gap in the railroad fence. They ran along the track, plaintiff still pursuing them, until they came to the railroad bridge across the canal. This bridge had no planking, the spaces between the ties being open. The colt ran upon the bridge, got in between the ties, and broke one of his legs. The premises of the plaintiff and those of the railroad company were not adjacent.

*Samuel Hand*, for applt.

*John W. Lyon*, for respt.

*Held*, That defendant incurred no liability to plaintiff by reason of its omission to maintain the fence except such as is imposed by the statute, Laws 1850, Chap. 140, § 44; Laws 1854, Chap. 282, § 8, which requires railroad companies to erect and maintain fences on the sides of their roads, but it does not impose upon them a general liability for any consequences which may result from an omission to do so, nor does it leave the question open what liability to third persons they shall be subjected to for such omission, as it defines in express terms the consequences for which they shall be liable to owners of cattle and horses getting on the track, viz: "So long as such

fences shall not be made, such railroad corporations and its agents shall be liable for damages which shall be done by the engines or agents of any such corporation to horses and cattle, etc., thereon."

This language clearly requires some action on the part of the company to produce the injury, either by mechanical or other agents of its own, and excludes the liability for injuries which the cattle or horses may do to themselves by straying on the track.

Judgment of General Term, reversing order of Special Term setting aside verdict for plaintiff and ordering new trial and directing judgment for plaintiff, reversed, and order of Special Term affirmed.

Opinion by *Rapallo*, J. All concur.

#### EVIDENCE.

N. Y. COURT OF APPEALS.

Hagenlocher, an infant, *respt.*,  
v. The C. I. & B. RR. Co., *applt.*

Decided May 5, 1885.

Although the injured party is a witness and testifies, his exclamations of pain may be proved and used to corroborate other evidence and give a more vivid description of his condition.

This was an action to recover damages for an injury received by plaintiff from the alleged negligence of defendant. On the trial, after the injury and the circumstances under which it occurred, and the condition of the plaintiff thereafter had been proved, one of her witnesses was asked: "What expression did she (plaintiff) make or what manifestations showing

that she suffered pain?" This was objected to by defendant as immaterial and incompetent, and the objections were overruled and the witness answered: "Why, you could not lift her nor do anything with her because she had such a pain in that foot." The witness was then asked: "How did she manifest that?" to which there were the same objections and the same ruling. The witness answered: "She screamed, and the foot was so sore that even the sheet could not touch it, and it was very much swollen."

*Thomas H. Rodman*, for applt.  
*Samuel D. Morris*, for resp.

*Held*, No error. Although an injured person is a witness and testifies at the trial, the exclamations of pain of such person may be proved and used to corroborate other evidence and to give a more particular or vivid description of his or her condition. So also the absence of such exclamations with other appearances may be proved as a circumstance bearing upon the question of suffering. *Greenl. Evi.*, § 102; 11 N. Y., 416; 28 id., 344; 35 id., 487.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

*Per curiam* opinion. All concur; *Danforth, J.*, in result.

#### PROMISSORY NOTES. PLEADING.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

*James Denick, applt.*, v. *William B. Hubbard, resp.*

Decided April, 1885.

Where the holder of a joint and several promissory note on parting with it adds his signature to those of the makers without any restriction he becomes severally liable to pay the sum named according to the terms of the writing; especially so as to a *bona fide* purchaser.

An antedated note is well pleaded if alleged to have been made on the day of its date.

Appeal from judgment entered on nonsuit.

April 28, 1877, Henry James and S. B. Terpening made and delivered to Reuben Terpening their promissory note as follows:

"Hannibal, April 28, 1877.

"On the twentieth day of March next, for value received, I promise to pay Reuben Terpening or bearer eighty-two dollars with use.

HENRY JAMES,  
S. B. TERPENING."

Soon after, the payee signed his name under the last signature and sold the note to defendant, who on August 25, 1877, signed his name above that of James and sold the note to one D., who afterward sold it for value to plaintiff.

The complaint set out the note with the four signatures. None of the defendants were served except Hubbard.

Defendant moved for a nonsuit, on the ground that there was a material variance between the contract alleged and proved, to wit, that defendant's contract was made Aug. 25, 1877, and that, if liable at all, he was liable as surety. The motion was granted and a nonsuit ordered.

*Giles S. Piper*, for applt.  
*S. N. Dada*, for resp.

*Held, Error.* There was no evidence that defendant contracted as surety instead of as principal, as between himself and D., from whom he received a consideration. When defendant signed this instrument it became his several and individual contract to pay the sum named according to the terms of the writing. It became as between himself and his transferee, as the evidence now stands, simply an antedated obligation by which he was bound. The contract in form is the joint note of the four signers and it is the several note of each. 29 N. Y., 400. Though it be void as a joint contract, it may be and is, under the evidence, good as the several contract of defendant. Byles on Bills, 13 Ed., 8. If an instrument be informal as a note, it may be good as an agreement, if shown to have been made on a consideration, as in this case, and it may be recovered upon.

An antedated note is well pleaded if alleged to have been made on the day of its date, and especially under the Code, which authorizes an instrument for the payment of money only to be set forth in *hæc verba*.

*Stone v. White*, 8 Gray 589, distinguished.

Again, there is no evidence upon the face of the contract or in the case that this defendant contracted with D. as surety for the other signers. If he did he could not show it as against plaintiff purchasing in good faith, before due, and a for valuable consideration.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

## CRIMINAL LAW. APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People, *respts.*, v. William V. Havens et al., *appls.*

Decided April, 1885.

An appeal in a criminal action cannot be taken solely from an order denying motion to set aside the indictment, but such order may be reviewed on appeal from the judgment on conviction.

Appeal from order of Court of Sessions, denying motion made under subd. 2 of § 313, Code Crim. Pro., to set aside the indictment.

The motion was made on the ground that one C., a stenographer, was in the Grand Jury room taking notes while one of the witnesses was being examined prior to finding the indictment. He was not present when the vote was taken, and it was admitted that he said or did nothing to influence any member of the Grand Jury, nor did he speak to any of them.

No judgment roll has been filed, nor judgment entered upon conviction as provided by § 485, Code Crim. Pro.

*W. P. Goodelle*, for *appls.*

*C. H. Lewis*, Dist. Atty., for *respts.*

*Held*, That defendants cannot maintain this appeal, which is alone from the order. By § 515 of the Code Crim. Pro. writs of error and of certiorari in criminal actions were abolished, and an appeal declared to be the "only mode of reviewing a judgment or order."



Section 517 prescribes in what cases an appeal may be taken to this court from a judgment on conviction after indictment. That section declares that upon such an appeal "any actual decision of the court in an intermediate order or proceeding *forming a part of the judgment roll* as prescribed by § 485, may be reviewed."

We think the legislature by prescribing the mode of review of intermediate orders in connection with a review of the judgment on conviction have excluded other appeals from such orders. See 64 How., 163; 92 N. Y., 145.

Our appellate jurisdiction in respect to such matters rests upon statutory provisions, and we know of no section of the statute authorizing such an appeal as the one now before us. Consent will not confer jurisdiction to hear an appeal. 22 Hun, 283; 47 N. Y., 67.

Appeal dismissed.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

## MORTGAGE. ASSIGNMENT.

### N. Y. COURT OF APPEALS.

Allison et al., ex'rs, *respts.*, v. Schmitz, *applt.*

Decided March 17, 1885.

A mortgage for \$2,500 being in process of foreclosure, defendant applied to plaintiff's testator for a loan to pay it off. Testator paid the amount of the mortgage and costs and a sum to defendant, making \$3,000 in all, and took a mortgage for that amount and also an assignment of the prior mortgage. On foreclosure of the \$3,000 mortgage it was declared void for usury. On foreclosure of the prior mortgage, *Held*, That the court was justified in holding that the assignment was

valid; that no payment of said mortgage is shown and that no usury having been pleaded it was not available as a defense. Affirming S. C., 18 W. Dig., 263.

This action was brought to foreclose a mortgage for \$2,500, executed by K. to J. Subsequent to its execution K. conveyed the mortgaged premises to defendant S. and she assumed the mortgage as part of the purchase price. The mortgage was subsequently assigned to one A., who in April, 1875, commenced an action to foreclose it. S. then applied to G., plaintiff's testator, for a loan to pay the money and costs of foreclosure, and G. having consented to make the loan, it was arranged that he, S., and A. should meet at the office of C., who usually did S.'s business, and was expected to to represent her in the transaction. C. having been notified by some one of what was going to be done at his office, wrote to A.'s agent to bring the mortgage there with the satisfaction piece. The next day C. telegraphed to A.'s agent to bring an assignment of the mortgage, and on the day following he came to C.'s office bringing the mortgage, an assignment and also a satisfaction thereof. G., plaintiff's testator, paid A.'s agent the amount due on the mortgage, and costs and a small sum of money to S., which altogether amounted to \$3,000. S. then executed to him a mortgage for \$3,000 dollars upon the same premises. It did not appear what was done with the satisfaction piece. The mortgage and assignment were left at C.'s office by A.'s agent, and were car-

ried away and retained by plaintiff's testator, and produced by him upon the trial. At the time the money was paid C. indorsed upon the bond accompanying the mortgage that the interest had been paid in full to the date of the three thousand dollar mortgage. Over six years afterwards G. brought an action to foreclose the \$3,000 mortgage. S. defended on the ground of usury, and succeeded in her defense. The mortgage was declared void. This action was then brought to foreclose the \$2,500 mortgage. S. in her answer denied the assignment of the mortgage to plaintiff's testator by A., and alleged that she paid A. the amount of the mortgage in full with costs of the suit commenced for its foreclosure, and received from her a satisfaction thereof. The court found that A. assigned the \$2,500 mortgage to plaintiff's testator, who paid her the full amount thereof with interest and costs of foreclosure; that S. executed the \$3,000 mortgage under an agreement that plaintiff's testator should loan her \$3,000, and out of such sum pay A. the full amount due on her mortgage, for principal, interest and costs of foreclosure, and that he paid such amount and took from A. an assignment of the \$2,500 mortgage; that except by the giving of the mortgage for \$3,000 the \$2,500 mortgage had not been paid, and no interest had been paid thereon since April 23, 1875. A judgment of foreclosure was given.

*C. P. Hoffman*, for applt.

*Irving Brown*, for respts.

*Held*, That the court was fully justified in holding that a valid assignment of the \$2,500 bond and mortgage to plaintiff's testator had been made; that no usury having been pleaded it is not available to defendant as a defense, and as to the defense of payment she has entirely failed.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur.

## MANDAMUS. COUNTY CLERKS.

### N. Y. COURT OF APPEALS.

The People ex rel. The German American L. & T. Co., *applt.*, v. Samuel Richards, Register, *respt.*

Decided April 21, 1885.

While the records in the office of a county clerk or register are public and every person has a right to examine and copy them at reasonable times, yet the clerk or register has the right to decide as to the manner in which such right shall be exercised and to say how many persons may be sent to work at the office at one time by a title guaranty company, and a mandamus to compel the clerk or register to allow the employes of such company to make searches and copy records is not allowable or proper.

The relator was incorporated by Chap. 392, Laws of 1882, as amended by Chap. 367, Laws of 1883. Among the powers granted by its charter is one to guarantee bonds and mortgages and titles to real estate, and to make and cause to be made, and to purchase and pay for such searches, abstracts, in-

dices, maps and copies of records as its trustees may deem necessary. The relator alleged that in July, 1883, its employes were refused by defendant, the register of deeds of Kings County, the opportunity of making searches and copies of records in his office, and a motion was made at Special Term for a peremptory mandamus commanding defendant to allow such employes to make such searches and copies of records. This motion was based upon several affidavits from which it appeared that in the register's office there are about four thousand large books in which are recorded conveyances, mortgages, satisfaction pieces and indices thereto; that in addition to such books there are kept and preserved as matters of public record maps of and relating to real estate, and all chattel mortgages filed since 1852; that the office is in use constantly by the public engaged in searching titles to real estate; that in the office where the books and records are kept papers are recorded and searches made under requisitions to the register as provided by law, and all papers are received and delivered and the general work of the register is done; that in addition to this a large amount of work is done by private persons, lawyers and experts in ascertaining the titles to real estate, and making searches which are for the purpose of current business in actual transactions pending; that in May, 1883, S., one of the relator's employes, came to defendant's office claiming to be in the employ

of the New York Title Co., and representing that he wanted to put a number of men at work to obtain copies of records, and saying that these men were not to be employed about the business or work of examining titles for transactions then being made, but their business was to copy the records of the office and accumulate information in the business of searching titles in which he was about to engage. He desired to put on a force of from a dozen to twenty-five men. This defendant refused to allow because it would interfere with the current business of the office. It was finally agreed that three men should be put to work. Subsequently S. came to the office with R., who commenced copying a book apparently under the directions of S., when defendant remonstrated with him for setting another man at work, and S. replied that it was for another company, the relator; that defendant objected and closed the book, whereupon both S. and R. left the office. Defendant also stated in his affidavit that he gave S. all the facilities he deemed consistent with the rights of the public in the office and as much as could be given without interfering with those engaged in the business of current searches and examinations of titles; that he was informed and believed that the relator and the New York Title Co. were one and the same company. There was proof tending to show that the two companies were under the same control and working to the same end. The court allowed the mandamus.

*Charles M. DaCosta and Julien T. Davies*, for applt.

*Jesse Johnson*, for respnt.

*Held*, Error. As the application was for a peremptory mandamus the facts, so far as they are disputed, must be taken as disclosed by the affidavits on the part of defendant. 73 N. Y., 173; 64 id., 600; 91 id., 385; Code Civ. Pro., § 2070.

The records in the defendant's office are public records which every person has the right to inspect, examine and copy at all reasonable times in a proper way. Defendant must necessarily have control of his office and of the records, and must have some discretion as to the manner in which persons desiring to inspect, examine and copy the records may exercise their rights, and some right to say how many persons could be sent there to work at one time by a company like the relator.

Order of General Term, reversing order granting mandamus, affirmed.

Opinion by *Earl, J.* All concur.

#### DEED. TITLE.

N. Y. COURT OF APPEALS.

*Smyth, Supt., v. Rowe et al.*

Decided March 24, 1885.

The grantor intended to convey to the center of the street, but by mistake described the land by the exterior line only. The grantee subsequently mortgaged the entire premises and thereafter the grantor quit-claimed that portion lying within the street. *Held*, That the intention of the grantor was thereby carried out and that an objection by a purchaser at the foreclosure sale that the mortgagor had

no title to the land within the street at the time the mortgage was given was without force.

Affirming S. C., 20 W. Dig., 98.

This is an appeal from an order of General Term, affirming an order of Special Term to compel a purchaser at a foreclosure sale to complete her purchase. It appeared that on Dec. 16, 1850, the Nat. M. B. Assn. was the owner in fee of the mortgaged premises; they then ran to the centre of the Bloomingdale road. The M. B. Assn. on that day conveyed said premises to C., bounding them on the exterior instead of the centre line of said road. The premises were subsequently conveyed to R. & B., the mortgagors. The purchaser at the foreclosure sale refused to complete her purchase because the mortgagors were not, when the mortgage was executed, owners in fee of that part of the premises formerly located within the line of the Bloomingdale road. It appeared that under Chapter 697, of Laws of 1867, said road was changed into a boulevard, and that portion thereof embracing the land in dispute was no longer used as a public highway. On Sept. 25, 1873, the Nat. M. B. Assn. at a meeting of its board of directors passed a resolution directing its president and cashier to execute a quit-claim deed to B. & R. of the lands in dispute here. It was stated in the resolution that the lands were intended to have been conveyed to C. in 1850. Such deed was subsequently executed.

*Denis O'Brien and Edward Mitchell*, for plff.

*Wheeler H. Peckham*, for purchaser.

*Held*, That the objection raised to the title is without force, as it was the intention of the Nat. M. B. Assn., at the time of its conveyance to C., to have included in the deed the strip of land in dispute and to have bounded the same by the centre instead of the exterior line of the Bloomingdale road, and such intention was carried out by the execution of the quit-claim deed to the mortgagors.

Order of General Term, affirming order of Special Term requiring purchaser to complete purchase, affirmed.

*Per curiam* opinion. All concur.

#### PARTIES. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Augustus DeBost, *respt.*, v. The Albert Palmer Co., *applt.*

Decided May 8, 1885.

Section 756 of the Code of Civil Procedure confers upon the court a very broad discretion to bring in a party who may have an interest in the suit; and, under such section, it is within the discretion of the court upon motion of either party to substitute as plaintiff the sole transferee *pendente lite* of the plaintiff's cause of action.

Appeal from order denying motion made by defendant to substitute as party plaintiff the sole transferee *pendente lite* of plaintiff's cause of action. The motion was denied upon the ground that § 756 of the Code of Civil Procedure, under which it was made, did not contemplate a motion on behalf of

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a defendant, and that the court had no power to grant such a motion.

*Jas. B. Dill*, for *applt.*

*George A. Strong*, for *respt.*

*Held*, That § 756 seems to confer a very broad discretion on the court, without any qualification whatever, to bring in a party who might have an interest in the suit. That it has not been made conditional that the motion should be made on behalf of the plaintiff, but a general power is given to the court to bring in a party in the exercise of its discretion. That that discretion had not been exercised in this case, and that the order should be reversed in order that the court might exercise the power that the Code has conferred upon it.

Order reversed.

Opinion *per curiam*.

#### WILLS. ADVANCEMENTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Laura Le C. De Caumont, *exrx.*, et al., *appls.*, v. Stephen G. Bogert, *exr.*, et al., *respts.*

Decided May 8, 1885.

When by the will of a testator he devises and bequeathes all his property, real and personal as provided by the laws of the state of N. Y. in cases of intestacy, whatever rights or interests his next of kin are entitled to in his estate are derived from the will and not from the provisions of the statute, and the effect of the reference made to the laws of the state in cases of intestacy is merely to determine who the persons are who should take under the direction contained in the will and the extent of the interests so to be taken. The provisions of the statute in regard to advancements do not apply to such a case,

and transfers of personal property made by the testator to certain of his next of kin previous to the execution of his will are not advancements to them, and are not intended to be such by him when it appears that he did not contemplate an equal division of his estate.

Appeal from a decree of the Surrogate of the County of N. Y., made upon the final accounting of Mary J. Morgan, as executrix of the will of Charles Morgan, deceased.

Charles Morgan died leaving a will by which he appointed his wife, Mary J. Morgan, his executrix, and devised and bequeathed all his property, real and personal, as provided by the laws of the State of New York in cases of intestacy.

Previous to the execution of this will he transferred to certain of his next of kin, in varying amounts, 30,000 shares of stock owned by him in the Morgan's Louisiana & Texas RR. & SS. Co.

It was contended upon this appeal that the executrix should be charged with these 30,000 shares of stock, and that the gifts of the same to the said next of kin should be considered as advancements to them.

It appeared that the testator had expressed an intention of distributing his estate before his death, giving the bulk of it to one person, and of not making any will, and thus to avoid a possible contest over it.

*John E. Parsons, Charles A. Davison and S. B. Brownell, for appls.*

*F. N. Bangs and John Sidney Davenport, for respts.*

*Held*, That whatever rights or interests the testator's next of kin took in his estate they derived from the will and not from the provisions of the statute, and the effect of the reference made to the laws of the state in cases of intestacy was merely to determine who the persons were who should take under the direction contained in the will and the extent of the interests so to be taken, and that § 91 of the statute providing for charging advancements, 3 R. S., 5th Ed., 104-5, §§ 90, 91, was inapplicable to the case. 18 Hun, 217; 1 Stockton, N.J. Eq., 309; 10 Watts, 54; 30 Georgia, 416.

*Lawrence v. Lindsay*, 68 N. Y., 108; and *Beebe v. Estabrook*, 79 N. Y., 246, distinguished.

That, furthermore, it could not be held as a matter of fact that the testator designed the transfer of these shares as advancements within the legal acceptance of that term, for he did not contemplate an equal distribution of his estate amongst his descendants, and it was in subordination to that intention that he made these transfers of the 30,000 shares of stock.

Decree affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

#### BAR.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*John A. Meagley et al., appls., v. The City of Binghamton et al., respts.*

Decided April, 1885.

A former adjudication is none the less a

bar to a subsequent action involving the same questions because the unsuccessful parties in the former action have joined another person with them as plaintiffs in the subsequent one.

Appeal from interlocutory judgment entered upon decision overruling demurrer to answer.

Action to restrain defendants from removing a bridge which spans State St., one of the streets of the city, and unites two pieces of land owned by John A. Meagley and occupied by M. & B. as tenants, who built the bridge in 1882.

Among other defenses the answer set up that the city brought an action against M. & B. in the Recorder's Court to recover penalties for the erection of this bridge and recovered judgment for \$200; that M. & B. appealed to the County Court, where a retrial resulted in a verdict of \$100 in favor of the city. The adjudication was pleaded as a bar to the right of action of M. & B., but not as to the right of action of John A. Meagley, the owner.

Plaintiffs jointly demurred to this defense on the ground that the facts alleged do not constitute a defense. The demurrer was overruled.

*Clark & Brown*, for appls.  
*Alex. D. Wales*, for respts.

*Held*, No error; that the former adjudication against M. & B. is a bar to their right to maintain this action. The subject matter in both actions is the same, to wit: whether State St. is a legal street and whether M. & B. had a right to erect and maintain this bridge

over it. It is alleged that these questions have been determined against them by the former adjudication. Were M. & B. sole plaintiffs in this action the conclusiveness of the former adjudication would not be questioned. The fact that M. & B. have joined another person with them as plaintiffs in this action, brought to retry their right to erect and maintain this bridge, does not render the former adjudication less conclusive as a bar to their right of recovery. 10 Hun, 554. See also, 24 How., U. S., 233; 10 Wend., 80; 6 Paige, 139; 7 Barb., 494.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## SLANDER. PRIVILEGED COMMUNICATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Emily Halstead, respt.*, v. *Edward B. Nelson, applt.*

Decided April, 1885.

A person vested with the control of a public institution and its employees, subject to the decision of its board of trustees or its executive committee, is within the class of persons whose communications made to his superior in the discharge of a duty are *prima facie* privileged.

The fact that the meeting of the committee at which such communication was made was not held on a day fixed by the by-laws will not render the occasion an unprivileged one.

Appeal from judgment in favor of plaintiff for \$1,200, entered upon verdict, and from order denying motion for a new trial on the minutes.

Action for slander. Jan. 19, 1878, some one mailed to defendant's wife a printed paper recommending and advertising articles for the prevention of conception and for procuring abortions and stating where they could be purchased, followed by a recommendation in writing signed "a lady friend."

The complaint alleges that on Jan. 19, 1878, at Rome, N. Y., defendant falsely and maliciously stated, in the presence and hearing of B. J. Beach and others, that plaintiff mailed the obscene matter to defendant's wife. It also contained two other counts charging the making of similar statements to other persons on other occasions, but no evidence was given except upon the first count. It alleged that by reason of the words spoken and set forth in the first and second counts she lost a lucrative situation in the Central Institution for Deaf Mutes, at Rome.

Answer, general denial; that all of defendant's acts and statements in connection with the matter were made in good faith upon probable cause, upon an occasion and to persons which rendered the acts and statements privileged, and mitigatory allegations.

Said institution is a corporation whose affairs are managed by a board of fifteen trustees, five of whom constitute the executive committee which exercises the powers of the board when it is not in session. Defendant was the principal of the institution,

the executive head, having charge of its internal affairs, with power to hire and dismiss employees, subject to the control of the board. Plaintiff had been appointed by the board as superintendent of the sewing department.

Plaintiff testified that she was notified to appear at the office of the institution, where she found Mr. Beach and two others of the executive committee and also defendant, and that Mr. Beach said to defendant: "You received this letter about 7 o'clock, did you not, Mr. Nelson?" Mr. Nelson said, "Yes; and it was a dirty, obscene letter, which had cost himself and wife much pain under the present circumstances and he knew I wrote and sent it." Defendant denied saying these words and is corroborated by the rest of those present. The committee had met at that time to consider whether plaintiff sent the paper and whether she should be discharged. The result was that she was discharged.

A motion was made on the minutes to set aside the verdict, on the exceptions, because it was excessive, was contrary to the evidence and contrary to law. The motion was denied.

*Francis Kernan*, for applt.

*W. E. Scripture*, for resp't.

*Held*, Mailing a circular of the kind described in the statement of facts was, in 1878, an indictable misdemeanor by the laws of this state, Laws of 1872, Ch. 747, § 2. Penal Code, §§ 318, 319, and by the laws of the United States. U. S. R. S., 2d ed., § 3893.



Charging a person with the commission of an indictable offense involving moral turpitude is slander *per se*. 3 Hill, 21; Towns. on Slander & L., § 154; Folk. Stark. on Slander, Ch. 2, § 44. We think it cannot be questioned that the commission of the offense charged involves moral turpitude.

It was the duty of defendant, as principal of the institution, to lay before the trustees the evidence in his possession bearing upon the question as to whether plaintiff did or did not commit the offense, and it was the duty of the trustees to examine the evidence and determine whether she should be continued in the employ of the institution. Persons vested with the control of public institutions created by law and having *quasi* judicial duties to discharge in respect to the public are, while acting within the limits of their functions, *prima facie* exempt from liability for publications which would otherwise be defamatory. Bigelow on Torts, 60; 17 N. Y., 190; 10 Abb., 1; 18 How., 550; Towns. Sl. & L., 3d ed., §§ 235-239. Defendant was vested with the control of this institution and its employees, subject to the ultimate decision of the board of trustees, or its executive committee, and is within the class of persons whose communications made to his superior in the discharge of a duty are *prima facie* privileged.

That the trial court properly held that the occasion was *prima facie* privileged. The fact that

the meeting was not held on a day fixed by the by-laws did not render the occasion an unprivileged one.

The court was asked to hold that the accusation was *prima facie* privileged, and absolutely so unless plaintiff established that it was made without probable cause and in bad faith or maliciously. This was declined and the court charged as follows: "I say that if he did on that occasion unnecessarily interfere and assert what was not true that it would be a publication in effect of this slander, a publication which would be unjustifiable under any circumstances of the case."

*Held, Error.* The evidence did not justify an inference that defendant unnecessarily interfered. He was rightfully present as an officer of the institution and had the undoubted right to express his belief, which cannot be properly characterized as an unnecessary interference, or left to the jury to infer that it was, and for this expression of belief he was not liable if he had probable cause for entertaining it. The fact, if it was a fact, that defendant said "that he *knew* I wrote and sent it," does not make the accusation absolutely an unprivileged one. At least it was error to charge, as matter of law, that defendant by using the word "knew" intended to assert that he knew of his personal knowledge, apart from the evidence before the committee, that she sent it; and further, that if the jury found that the assertion was made and

that in fact she did not send it, defendant was liable.

When persons are so circumstanced that it is their right and duty to lay before a governing body of a public institution, rightfully acting in a *quasi* judicial capacity, accusations relating to the conduct and affecting the reputation of an employee amenable to the governing body, they do not lose immunity from liability by reason of general ill-will entertained by the accuser against the accused. If the specific act is an actionable wrong the accuser is liable, but not without. General ill-will is not actionable, though sometimes evidence of it is admissible to enable a jury to infer that a specific act was prompted by malice. 4 N. Y., 157. When an accusation relates to a subject in relation to which the accuser has a duty to perform and is made to a board of officers whose right and duty it is to act upon the accusation the accuser is not liable if he had probable cause for making the accusation. 23 Wend., 26; 10 Abb., 1; 18 How., 550; 21 Wend., 319; 15 Barb., 105; 3 Sandf., 341; 1 M. & R., 198; Towns. on Sl. & L., 3d ed., §§ 235-239.

Plaintiff's theory was that defendant sent, or procured the communication to be sent, for the purpose of accusing plaintiff and procuring her discharge. The court was asked to charge that if defendant did not write, send, or procure to be written and sent the communication plaintiff was not entitled to recover, which was refused.

*Held*, Error. Unless plaintiff's theory was established as a question of fact defendant was entitled to a verdict. Unless defendant sent or procured this communication to be sent defendant had probable cause for the accusation.

Judgment and order reversed and new trial granted, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## CRIMINAL LAW. INDICTMENT.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Rugg, *applt.*

Decided March 27, 1885.

The designation by the County Judge of the terms at which Courts of Sessions shall be held is an order of that officer in pursuance of the statute and a notice to the county clerk to draw grand jurors.

The provisions of the Code do not compel the pleader to confine the indictment to a single statement of the facts where the proof is uncertain, but it is competent to allege in different counts such facts as may by possibility be presented on the trial.

Section 10 of the Penal Code is to be interpreted in connection with §§ 436, 437, of the Code Crim. Pro.

Affirming S. C., 21 W. Dig., 84.

The defendant was indicted for murder in the first degree and was tried and convicted of that offense. Various questions were raised upon the trial. It was claimed that the indictment should have been set aside because the grand jury by which it was found was not legally organized; that no copy of the order of the Court or Board of Su-

pervisors, summoning the grand jury for the term of the Court of Sessions at which the alleged indictment against the defendant was found, was filed as required by statute, and that there was no record of any order by the court or board of supervisors summoning a grand jury for the said term. The record from the county clerk's office was produced showing the appointment by the county judge of the times and places of holding terms of the county court and court of sessions and designating those terms at which a grand jury should be summoned as required by law, among which was the one at which the indictment against the defendant was found. There was also proof of the publication of the notice of the holding of courts in the county as required by law.

*Richard Busteed*, for applt.

*John Fleming*, Dist. Atty., for respts.

*Held*, That the claim of defendant was untenable; that the grand jury that indicted defendant was lawfully drawn and summoned in pursuance of § 45 of the Code of Criminal Procedure. The provision of § 226 of said Code, that a grand jury may be drawn for every other court of sessions (not named in the preceding section) when specially ordered by the court or board of supervisors, was intended to provide for the drawing of a grand jury when no designation had been made by the county judge under § 45, or where special circumstances existed requiring a grand jury to be drawn

and summoned independent of those provided for in that section. There being no absolute requirement that a grand jury must be drawn, but merely a declaration that it may be, it was a matter of discretion to be exercised as circumstances might demand.

The designation by the county judge of the terms at which courts of sessions shall be held is an order of that officer made in pursuance of the statute, and a direction and notice to the county clerk to draw said jurors and to the proper officer to summon them to attend.

It was claimed that the indictment was drawn in defiance of §§ 273 and 275 of the Code of Criminal Procedure, by which all forms of pleadings existing in criminal cases prior to said Code are abolished and which provide that the indictment shall contain a plain and concise statement of the act constituting the crime without unnecessary repetition. It was also claimed that the commission of more than one crime was charged. The indictment contained four different counts which stated the commission of the same offense in different forms so as to meet the evidence which might be presented on the trial. There was no direct proof by an eye witness of the commission of the offense charged and it was connected with the commission of other crimes.

*Held*, That the objections made were not good; that it was competent to allege in the different counts such facts as might by possibility be presented upon the trial,

and as the proof as to these could not be anticipated with exactness, such allegations were proper, and within the provisions of the Code.

These provisions do not compel the pleader to confine the indictment to a single statement of the facts where the proof is uncertain.

*Also held*, That the claim that more than one crime was charged was untenable. The indictment charged the commission of the crime of murder in the first degree. The jury brought in a general verdict of guilty.

*Held*, No error; that § 10 of the Penal Code, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime of which he is guilty," must be interpreted in connection with the provisions of the Code of Criminal Procedure having a bearing upon the subject, §§ 436, 437, which authorize a general verdict of guilty or not guilty, and declare that such verdict "imports a conviction or acquittal of the offense charged in the indictment."

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Miller, J.* All concur.

#### GUARDIAN. TENANTS IN COMMON.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Mary Ann Coakley, general guardian, *respt.*, v. James Mahar, *applt.*

Decided April, 1885.

Where the co-tenant of an infant has collected and retained the whole of the rents the general guardian of the infant may maintain an action against him for the infant's share as for money had and received.

In such an action the defendant cannot counterclaim for improvements made without the plaintiff's assent.

Appeal from judgment entered on verdict for plaintiff for \$69.08.

Plaintiff sues as general guardian of Sarah Mahar, an infant, to recover one-half the rent of certain premises owned in common by the infant and defendant, and rented to tenants by defendant with the consent of plaintiff. For a time the rent was equally divided, each of the parties collecting an alternate month's rent; but afterwards defendant for several months collected the whole of the rent.

Defense, that plaintiff as general guardian has no cause of action, and secondly, by way of counterclaim, that defendant has expended for taxes, improvements and repairs more than the amount of rent received.

The court directed the jury to allow defendant for one-half the taxes paid and one-half the necessary repairs and render a verdict for the remainder.

*R. O. & J. G. Jones*, for *applt.*  
*Edward Lewis*, for *respt.*

*Held*, That the action is well brought. The general guardian of an infant is answerable for and entitled to receive the issues and profits of the land of the ward. 2 R. S., 153, § 20. He has power to lease the land. 7 Johns. Ch., 150; 63 Barb., 271; 3 Wait's A. &

D., 553. The guardian can maintain an action for the rents. 7 Wend., 45; 8 Barb., 48. The powers of a guardian are commensurate with his duties. 33 N. Y., 289. Section 1666, Code Civ. Pro., has no application to this case. That and the cognate sections relate to "real actions." This is a personal action. It is an action in debt, not for the recovery of rent as such, but for the recovery of money had and received by defendant which belongs to the ward of the plaintiff and for which the guardian may sue. 56 Barb., 197; 59 How., 24; Simpson's Law of Infants, 212. The evidence shows that by custom one-half of the rent was to be paid to each party.

That defendant could not counterclaim the expense of improvements made without plaintiff's assent. It is well settled in this State that a tenant-in-common cannot recover from a co-tenant the expense of improvements made, unless the co-tenant assented to the improvements. 60 Barb., 163; 48 N. Y., 106; 31 Hun, 522.

The notice of appeal stated that it was also from an order denying a new trial, but no such order is in the appeal book, but a statement is found therein that a motion for a new trial was made on the judge's minutes and denied, to which defendant excepted.

*Held*, That a formal order duly entered is the only competent evidence of the determination of such a motion. The statement that a motion was made and denied and an exception taken is not equivalent to an order, and the statement

and exception present no question for review. 23 Hun, 273; 63 N. Y., 656. The grounds upon which the motion for a new trial on the minutes was made do not appear and for that reason the errors of the jury, if any, are not before this court. 34 Hun, 178; 20 W. Dig., 401.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### TRESPASS. DAMAGES. SURETYSHIP.

##### N. Y. COURT OF APPEALS.

Lord, adm'r, et al., *respts.*, v. Tiffany et al., *appls.*

Decided March 3, 1885.

The party injured by a trespass may bring as many actions as there were wrong-doers. He can have but one satisfaction for damages, but may have the costs in all the actions.

T. commenced separate actions against S. and L. for the same trespass and recovered judgments in each. Upon affirmation he brought actions on the undertakings and recovered. One of the sureties of S. paid nearly the full amount of the judgment against him and assigned to T. his claim for reimbursement against his principal co-surety. *Held*, That on payment of a sum sufficient to pay the balance of the damages and the costs in all the actions S. and his sureties would be released, and that the co-surety was entitled to be released from one-half of the judgment against him.

Defendant T. commenced two actions, one against L. and another against S., both of whom were wrong-doers, for the same trespass. T. recovered a judgment in both actions. Each judgment was appealed from and affirmed by the General Term and the Court of

Appeals. T. also brought separate actions on the undertakings given upon the several appeals, in which he recovered judgments. One of the sureties for S. paid nearly the full amount of the judgments against him, at the same time agreeing that the payments should not affect T.'s right to collect all his judgments against all the other parties, and assigned his claims against his principal and co-surety by reason of such payment. T. agreed to and did release the surety separately from the judgments against him.

*William Tiffany*, applt., in person.

*George H. Forster*, for respts.

*Held*, That upon the payment of a sum which, in addition to that already paid by the surety of S., would be sufficient to satisfy the damages and costs in all the actions, S. and his sureties would be released, and that G., the co-surety, was entitled to judgment releasing him from one-half of the judgment against him and restraining the collection of more than one-half from him.

A case was made for equitable relief.

A surety is entitled to the benefit of any security taken by the creditor. This rule applies also to money received by him from a person who could not have paid it or could not have been compelled to pay it if he had not sustained that relation.

A surety can neither directly nor indirectly, by his own act or in conjunction with a creditor, keep a judgment alive in order to coerce

payment from his co-surety, or in any other way qualify the effect of his payment to the prejudice of the other surety.

For a trespass the party injured may bring as many actions as there were wrong-doers. Although he recover a judgment in each action he can have but one satisfaction, 1 Johns., 289; 29 N. Y., 591. He may have, however, the costs in all the actions.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Danforth, J.* All concur.

## TAXATION. ASSESSORS.

### N. Y. COURT OF APPEALS.

The People ex rel. Osgood et al., ex'rs, *appls.*, v. The Commissioners of Taxes of New York, *respts.*

Decided May 5, 1885.

Where the evidence before the assessors fails to show that the assessment is erroneous in whole or in part it is their province to determine the amount of the property liable to taxation.

The "just debts" which may be deducted from the personal property are legal, valid and incontestible obligations. Disputed claims against an estate for which the surrogate has directed a portion of the estate to be retained by the executors do not fall within the definition of just debts within the statute.

Affirming S. C., 21 W. Dig., 93.

The relators seek in this proceeding to review the determination of defendants in assessing them for personal property retained by them as executors, by order of the surrogate, "for the payment of disputed and other claims and the further expenses of admin-

istration." The relators applied to defendants to remit said estate altogether from their assessment rolls, and presented an affidavit showing that there were unpaid claims made against the estate exceeding the amount of assets in their hands, and that in consequence thereof they had no personal property of said estate subject to taxation. The commissioners reduced the assessment to the sum admitted to be in the hands of the executors, and as to that amount confirmed it. The claims made against the estate were contested by the executors and their validity had never been admitted nor established. Their nature did not appear.

*John M. Bowers*, for aplts.

*D. J. Dean*, for respts.

*Held*, That the action of the commissioners was proper. It is essential to the support of a claim to reduce or nullify an assessment made by the proper officers that it should be made to appear affirmatively by sufficient proof that such assessment is in part or as a whole erroneous. 91 N. Y., 581. If the evidence fails to show this or leaves the matter in doubt, it is the province of the assessors to determine the amount of the property liable to taxation.

The use of the term just debts in the statute, 2 R. S., 7th Ed., 991, § 10, implies that legal, valid and incontestible obligations must be shown in order to entitle an estate to the benefit of the statute.

Order of General Term, affirming proceedings of the commissioners, affirmed.

Opinion by *Ruger*, Ch. J. All concur.

## RAILROADS. CONVERSION.

### N. Y. COURT OF APPEALS.

*McCormick*, *respt.*, v. The Pennsylvania Central RR. Co., *applt.*

Decided April 14, 1885.

Plaintiff having refused to pay for extra baggage, defendant's agent refused to deliver the checks or the baggage, which was in plain sight and could have been returned. Defendant's president authorized plaintiff to receive the baggage at P. without checks, and promised it should be stopped there. It, however, went on to C. and was burned there in the depot. *Held*, That defendant was liable for conversion of the baggage.

On March 11, 1862, between 10 and 11, P. M., and about twenty minutes before the schedule time for starting the train, plaintiff and his family arrived at defendant's depot in Philadelphia with nine pieces of baggage, for the purpose of taking passage for Chicago. Defendant's baggage-master demanded an additional charge for extra baggage, which plaintiff refused to pay, and the baggage-master refused to deliver the checks for the trunks until it was paid. Plaintiff several times demanded the return of his baggage or the delivery of checks therefor. The baggage-master testified that he gave as a reason for not returning the baggage that the train was about to start and it had been placed in the van in such a position as to make it inconvenient or impossible to reach it and redeliver it in season for the train to leave on its schedule time. Plaintiff's

evidence tended to show that the baggage was in plain sight and accessible, and that there was sufficient time to remove it and deliver it to plaintiff before the time for the starting of the train. Plaintiff refused to take a passage on the train, but returned to his hotel with his family where he remained until the next day. That morning plaintiff called on defendant's president, who authorized him to receive his baggage at Pittsburg from defendant's agent there without producing checks and promised that defendant would cause baggage to be stopped at Pittsburg and delivered to him on demand. That evening plaintiff with his family took passage on defendant's train, and when he arrived at Pittsburg the next day applied to defendant's agent for his baggage, but was informed that through inadvertence it had not been taken off but had been allowed to go through to Chicago, and an order was endorsed upon a copy of the one addressed to him directing the baggage agent at Chicago to deliver the baggage to plaintiff on demand without checks. Plaintiff's family continued their passage on the same train, but he stopped over a train at some place on the route and did not arrive at Chicago until the next day (March 14th). On the night of the 13th defendant's depot at Chicago was struck by lightning and with its contents burned. Plaintiff's baggage had been stored in the depot and only a small portion of it was saved, which was delivered to and accepted by him. This action was

brought for a conversion of the baggage.

*Charles M. Da Costa*, for applt.  
*Roscoe Conkling*, for respt.

*Held*, That plaintiff was entitled to recover; that as the evidence showed that the baggage could have been returned to plaintiff when demanded at Philadelphia defendant's conduct in retaining it amounted to a conversion, and there was an original, wrongful detention of plaintiff's property by defendant, and a defeat, through the negligent or willful misconduct of defendant and its servants in carrying it beyond the point agreed upon for its redelivery, of every effort on the part of plaintiff to regain its possession.

Opinion of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Puger*, *Ch. J.* All concur.

## USURY. RELEASE.

### N. Y. COURT OF APPEALS.

Moorehouse, rec'r, *respt.*, v. The Second National Bank of Oswego, *applt.*

Decided March 24, 1885.

Defendant having taken excessive interest from one McR., the latter agreed to discharge all claims in his favor on account thereof, and not sue or allow any suit to be brought against defendant on account thereof, and in consideration thereof defendant agreed to discharge all of his indebtedness to defendant which might remain after applying all other collections available. *Held*, That this operated as a release and discharge of McR.'s cause of action and was a good defense to an action brought by McR.'s receiver to recover such excessive interest, and that the original



liability of defendant was not revived upon its mere failure to perform its part of the agreement.

This action was brought by plaintiff as receiver of one McR., appointed in proceedings supplementary to execution, to recover under section 5198 of the U.S. Revised Statutes twice the amount of excessive interest alleged to have been taken and received by defendant on loans made by it to McR. The referee found that on Nov. 1, 1876, an oral agreement was made between McR. and defendant, whereby McR. agreed to settle and discharge all claims and causes of action in his favor against defendant, for or on account of his having paid more than seven per cent. upon loans and discounts, and that all such matters be applied in payment of that part of his indebtedness to defendant not collected by defendant from any other source, and that he would not sue or allow any other suit to be brought against defendant for or on account of such illegal interest. In consideration thereof defendant's officers, for and in its behalf, agreed that it would satisfy so much of the indebtedness of McR. as remained after applying all other collections available, or would consent as a creditor to his discharge in bankruptcy, as McR. might request. When this agreement was made McR. was indebted to defendant for loans and discounts to a large amount, and on June 26, 1879, after applying all collections made by it McR. still owed on the indebtedness existing Nov. 1, 1876,

without taking into account the excessive interest paid, \$7,847.73, no part of which has since been paid.

*S. C. Huntington*, for applt.

*B. B. Burt*, for resp't.

*Held*, That the agreement of Nov. 1, 1876, was a good defense. It operated from its very nature as a discharge and satisfaction of McR.'s claim against defendant. The mutual promises of the parties were not dependent so as to render the discharge of McR.'s claim conditional upon full performance by defendant. The law acting upon the agreement itself made the application without further act of the parties. 24 N. Y., 386. The agreement not to sue or to permit suit to be brought, being general and unlimited, operated as a present release and discharge of McR.'s cause of action. 19 Johns., 129; Addison on Contracts, 270. It was not a technical release, but operated as such, and the fact that it was oral does not affect the application of the principle. 5 Met., 442; 24 N. Y., 386; 44 Barb., 641.

It was claimed that defendant took proceedings subsequent to the agreement inconsistent with it.

*Held*, That the agreement having been established, its violation by defendant would not affect its legal operation.

A cause of action on contract or for tort may be extinguished by an agreement between the parties, although it is executory; if such agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. 75 N. Y., 574.

If one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the debtor, he cannot afterwards enforce his original cause of action upon a mere failure by the other party to perform his promise.

Judgment of General Term, affirming judgment for plaintiff, reversed.

Opinion by *Andrews, J.* All concur, except *Ruger, Ch. J.*, not voting.

## WILLS. TRUSTS.

### N. Y. COURT OF APPEALS.

*Benedict et al., ex'rs, respts., v. Webb, applt.*

Decided March 17, 1885.

Testator left a widow and four children, two of whom were minors. By his will he left his estate to his executors in trust to invest and pay the income to his wife and children until all or the youngest survivor should come of age and then to divide the estate, two-thirds to be divided among the children, the shares of the two daughters to be held in trust for them respectively and the income paid to them during their lives, with power of sale to carry out the trust, etc. One of the daughters was a minor. *Held*, That the suspension of alienation for two minorities would be equivalent to one for two lives; that the trust for the minor daughter was lawful, but that for the other daughter was void, it being for three lives.

Plaintiffs, as executors of the will of B., entered into a contract with defendant to sell him certain real estate which belonged to the testator. The defendant claimed that the power of sale contained in the will was not valid. This action was brought to compel a

specific performance of the contract. It appeared that B. died in 1840, leaving him surviving a widow and four children, two of whom were minors. After some legacies he left the residue of his estate to his executors in trust. He directed the net income to be divided and paid to his wife and children and to their issue in case of their death in certain proportions "until all my said children, or the youngest survivor of them, shall have attained the age of twenty-one years," at which time his estate should be divided as follows, viz.: one-third to be set apart for the use of his widow, the rents, income and profits thereof to be paid to her during her natural life, and the remaining two-thirds to be divided among his children, the shares of his two sons to be paid over to them and the shares of his two daughters to be held in trust, the income to be paid to the daughters during their lives respectively. One of the daughters was a minor. The testator vested in his executors power to sell the real estate "if they should deem it expedient for the purpose of making such division as \* \* \* directed, or for carrying into effect all or any other of the purposes and trusts" specified in the will.

*George S. Hamlin*, for applt.

*Samuel Hand*, for respts.

*Held*, That this action could not be maintained; that the power vested in the executors by the will was dependent upon the validity of the trust created by the will; that as under the will the estate was not to be divided until both

the minor children had attained the age of twenty-one years, the suspension of alienation would be for two minorities, which would be equivalent to two lives; that as to the shares of the two sons which would then vest absolutely the limitation of the trust was lawful, and the trust as to the share of the minor daughter was also lawfully limited, for the reason that her minority and the remainder of her life constituted but one life. As to the share of the other daughter the trust was void, the power of alienation being suspended for three lives, and as to that part of his estate the testator died intestate. 16 Wend., 71; 33 N. Y., 596.

*Also held*, That as to uphold the trust as to the other children and set it aside as to this one would seriously interfere with the testator's intention that all the children and their issue should share equally in his estate, and produce great injustice, the whole trust should be held void. 17 N. Y., 562; 47 id., 390.

Judgment of General Term, on submitted case for plaintiffs, reversed.

Opinion by *Andrews, J.* All concur, except *Ruger, Ch. J., Earl and Finch, JJ.*, dissenting.

#### PRACTICE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Frances Cornish, respt., v. Sarah Graff, applt.*

Decided April, 1885.

When a case is settled and filed after entry of judgment the Judges, Court or Referee

should order it annexed to the judgment roll.

It is the duty of counsel to remain in or be represented in court until the jury is discharged, and they cannot, by withdrawing from court, deprive the court of its power to recall and reinstruct the jury. A failure by the court, in such a case, to send for counsel before reinstructing the jury is not error.

In an action to recover the value of services, where the issue is as to what was the agreed price, evidence of the value of the services is competent as bearing on the probable truth of the claims of the respective parties.

Appeal from judgment in favor of plaintiff entered on verdict, from order denying motion for a new trial and from order striking out exceptions from the case.

Action to recover for services as a nurse between Sept. 1, 1880, and Oct. 19, 1881, alleged to have been worth \$10 per week, amounting in the whole to \$500, which sum defendant agreed to pay, and it was admitted that \$286.44 had been paid.

Answer, general denial; that defendant is a married woman living with her husband and that the services were rendered at the agreed price of \$5 per week, and that plaintiff has been fully paid.

After the jury retired defendant's counsel left the court. Before adjournment for the day the jury asked for further instruction. An officer was sent for defendant's counsel, but he could not be found, and thereupon, in his absence, the court further instructed the jury, who brought in a sealed verdict in the morning. After the rendition of the verdict defendant's counsel excepted to the right of the court to further instruct the jury in the absence of counsel, and also to the

substance of the instruction. Both exceptions were allowed by the trial judge who settled the case almost a year after the judgment was entered, but did not order it annexed to the judgment roll.

Afterwards, on motion before another justice, these exceptions were stricken out on the ground that under § 995 of the Code they could not be taken after the jury had rendered its verdict. On the case as resettled a motion was then made for a new trial, which was denied.

*Isaac D. Garfield*, for applt.

*Hancock & Munro*, for resp't.

*Held*, An appeal from a judgment brings up for review only questions of law which are contained in the judgment roll. Section 1237, Code Civ. Pro., provides that a case settled and on file at the time a judgment is entered shall form a part of the judgment roll. When a case is settled and filed after the entry of judgment the Judge, Referee or Court should order the case annexed to the judgment roll. 30 Hun, 214. In the case at bar no order was made at the Circuit directing a case to be annexed to the judgment roll after entry and none was made by the judge who settled the case. Both parties desiring a determination of this case on the merits we will decide it, but it must not be regarded as sanctioning this practice.

The appeal from the order striking out the exceptions to the instructions need not be specially considered, for if the court had not the right to instruct the jury in the absence of defendant's coun-

sel the point is available without an exception. If the court had the right, but abused it, the point is available on a motion for a new trial, which has been made on a case, and the appeal from the order denying a new trial brings the question before this court. 51 N.Y., 558.

The trial of a case is not concluded until the jury is discharged from its consideration. Code Civ. Pro. § 992. The power of the court to recall and reinstruct the jury has never been judicially doubted in this State. Counsel by purposely or inadvertently withdrawing from the court cannot take away the power, or suspend the right to exercise it until they can be found and brought in if willing to come. It is the duty of counsel engaged in the trial of a case to remain in, or be represented at the court during its sessions until the jury having the case in charge is discharged. 6 Jurist, (Exc.) 133. The failure of counsel to perform their duty does not deprive the court of its power to discharge its duty. The court is not required to send out its officers to invite counsel to attend to their duties and hear additional instructions which the court proposes to give to the jury. Undoubtedly, in most cases, courts will endeavor, as a matter of courtesy, to secure the attendance of counsel before reinstructing a jury, but it is not error if it is not done. 67 How., 65, aff. 34 Hun, 625; 1 Hals., 109; 26 Wis., 295; 7 Am., 81.

*Burke v. Webb*, 2 W. Dig., 579; *Bunn v. Croul*, 10 Johns., 239; *Taylor v. Betsford*, 13 id., 487;

Moody v. Pomeroy, 4 Den., 115; People v. Cassiano, 30 Hun, 388; Redman v. Gulnac, 5 Cal., 148; People v. Trim, 37 id., 274; Campbell v. Beckett, 8 Ohio St., 211; Kirk v. State, 14 id., 512, distinguished.

There is no statute or rule of practice in this State which prohibits the court in civil cases from instructing the jury in the absence of counsel. The power to reinstruct a jury in the absence of counsel may, like other powers, be abused; and if it is the wrong can be corrected on a motion for a new trial. But in this case there was no abuse; the additional instructions were given publicly, during a regular session of the court, and after a prolonged but unavailing search for defendant's counsel by the officers of the court under its direction.

In an action to recover the value of services when the issue is, what was the agreed price, the complaint averring that the services were worth the agreed price, evidence of the value of the services is competent as bearing upon the probable truth of the claims of the respective parties. 41 N. H., 232; 15 Gray, 538; 51 N. Y., 635; 9 Bos., 224; Abb. Trial Ev., 367, 368.

Marsh v. Holbrook, 3 Abb. Ct. App. Dec., 172, distinguished.

That defendant was not injured by the additional instruction that plaintiff was entitled to recover the contract price, whatever the jury found it to be, and that the contract price was either \$5 or \$10 per week. That was the precise issue.

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Judgment and orders affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

## JUDGMENT. DIVORCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Wm. Gibson Jones, *respt.*, v. Lula V. Jones, *applt.*

Decided May, 1885.

When an action of divorce is commenced in another State by a husband or wife resident therein against the other party at the time residing in this State, service of the process of the foreign court in this State upon the defendant will not confer jurisdiction over the latter's person nor authorize a judgment dissolving the marriage which will be effectual or operative beyond the State in whose tribunals it may have been obtained, and the foreign court cannot acquire such jurisdiction by the appearance of the defendant for the purpose of objecting and alleging the want of it, and, if such plea or answer be overruled, he may still contest the merits of the action without depriving himself of the validity of the objection taken to the jurisdiction of the tribunal in proceedings brought for the direct purpose of reviewing and correcting the adverse decision; but, when a husband appears for the above purpose in an action for a divorce brought against him by his wife, and judgment is entered therein affirming the jurisdiction of the court and dissolving the marriage, such judgment will be a bar to an action for divorce brought by him against his wife in this State, and it cannot be impeached for want of jurisdiction collaterally in the latter action even though it may be considered erroneous by the courts of this State.

Appeal from judgment recovered on trial at Special Term.

Plaintiff commenced this action for the purpose of obtaining a divorce from defendant. Defendant appeared and answered,

and, subsequent thereto, acquired a residence in the State of Texas, where she commenced proceedings to obtain a divorce from plaintiff. Plaintiff was served in the city of New York with a citation issued by the Texas court in said proceedings, and subsequently appeared therein and filed an answer, first, alleging want of jurisdiction on the part of the court, and afterwards presenting his defense to her action on the merits. The issue thus joined came on for trial, and a judgment was rendered affirming the jurisdiction of the court and dissolving the marriage. Thereafter, the defendant herein obtained leave to set up this judgment of the Texas court as a defense to this action by way of supplemental answer, and the questions of law and fact raised thereby were tried at Special Term where it was held that the Texas court had no jurisdiction of the plaintiff at the time of rendering the judgment, and judgment was entered overruling the defense.

*Wm. W. Badger*, for applt.

*Edwin B. Smith*, for respt.

*Held*, That, if the judgment of the Texas court was binding upon plaintiff, it constituted a defense to this action, for if defendant's marriage with plaintiff had been thereby dissolved she was no longer his wife and he was accordingly disabled by that fact from further prosecuting this action against her under the laws of this State; the right to maintain such an action being secured only to a person sustaining the relation of

husband or wife to the defendant. 3 R.S., 6th ed., 155-6; Code Civ. Pro., § 1756.

58 Maine, 508, distinguished.

That it is now well settled by the authorities that when an action of divorce is commenced in another State by a husband or wife resident therein against the other party at the time residing in this State, service of the process of the foreign court in this State upon the defendant will not confer jurisdiction over the latter's person nor authorize a judgment dissolving the marriage which will be effectual or operative beyond the State in whose tribunals it may have been obtained. 4 Lans., 388; 110 U. S., 151; 19 Ohio, 502; 122 Mass., 156; 76 N. Y., 78.

That it has also been held, not only by the courts of this State, but in other States and in the Supreme Court of the United States, that a court in which a legal proceeding has been carried on without obtaining jurisdiction of the person of the individual designed to be proceeded against could not acquire such jurisdiction by his appearance for the purpose of objecting and alleging this want of it, and that, if his plea or answer were overruled, he might still contest the merits of the action without depriving himself of the validity of the objection taken to the jurisdiction of the tribunal, 4 Den., 72; 37 N. Y., 9; 17 Wend., 85; 4 Barb., 541; 9 Barb., 61; 15 How., 17; 1 T. & C., 578; 19 Wall., 223; 98 U. S., 476; 4 Robt., 616; 120 Mass., 549; 20 Texas, 289; 7 Texas, 598; 106 U. S., 118; and under the

rules settled by these authorities plaintiff was probably entitled to a judgment in the Texas court relieving him from the effect of the action commenced in the manner in which it was commenced; and, if his appeal could have been extended so as to bring the case within the authority of the Supreme Court of the United States, that might well have been the result according to the decisions made by that tribunal.

But that, in all the above cases where the law has been so applied to the determination of the point of jurisdiction over the person, it has been by way of proceedings brought for the direct purpose of reviewing and correcting the adverse decision, which was not the case here, for the judgment of the Texas court was in full force and unreversed, and it did not follow from the circumstance that that court may have decided erroneously that plaintiff could avoid the effect of the determination so made by now insisting upon the error and establishing his right to have had the point of jurisdiction determined in his favor, for a judgment, unreversed, is binding upon the parties in another action between them involving the same point. 4 Seld., 448; 35 N. Y., 279; 82 id., 555-9; 88 id., 652; 94 id., 423.

That the effect of the judgment of the Texas court in that State was to finally establish the jurisdiction of the court and to dissolve the marriage; and that, by the constitution of the United States, the same force and effect is required to be given it in this State.

§ 1, art. 4, Cons. of U. S.; 7 Cranch, 481; 5 Wall., 290; 9 id., 108; 45 N. Y., 535.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, concurs. *Brady, J.*, dissents.

## TRUSTS. PERPETUITIES.

### N. Y. COURT OF APPEALS.

*Tiers, applt., v. Tiers, ex'r., et al., respts.*

Decided April 14, 1885.

The will of testatrix devised her estate in trust to her executors to divide the same into six equal parts; to convey two of such parts to two of her sons; to divide the income of the remaining four equal parts among her three remaining sons and her daughter in equal shares equally during their several and respective lives; upon their several and respective deaths to convey the shares of the principal producing the income of the one so dying to his or her child or children upon their arriving at the age of twenty-one years, and to the issue of any such children who might be deceased at the death of his parent, but if any such children should die before the age of twenty-one, and without leaving issue, then the share of the one so dying should become part of the residuary estate for the benefit of all the testatrix' children, in the same share and under the same trusts and limitations before provided for. *Held*, That the trust was valid of one-fourth for each terminable as to each at his or her death; that the children referred to in the direction as to contingent remainders are the children of the beneficiaries.

It also provided that in the event of either of the testatrix' children dying without issue, but leaving a wife or husband surviving, then the income of the share of the one so dying should be paid to the surviving wife or husband during life, and, after the death or marriage of such surviving wife or husband should be divided according to the terms of the will. *Held*, void.

Affirming S. C., 19 W. Dig., 248.

This action was brought to obtain a construction of the will of T. By the third clause a trust was created to divide the residuary estate of the testatrix into six equal parts; to convey two of said parts; to invest four parts, collect the income and divide it equally among four of her children, naming them, during their lives, and upon their several and respective deaths to convey the share "of the one so dying to his or her child or children upon their arriving at the age of twenty-one years and to the lawful issue of any such children who may be deceased at the time of his or her or their parents' death; but if any such children should die before the age of twenty-one years, and without leaving lawful issue, then the share or portion of the one so dying shall become and form part of my residuary estate for the benefit of all my children, in the same share and under the same trusts and limitations as are provided in this clause of my will, in all respects as if such share or portion had been included and formed part of the original division." If either son died without issue leaving a widow, it was provided that the income of the share of her husband should be paid to her so long as she remained a widow, and if the daughter of the testatrix died leaving a husband and no children surviving, the income of her share should be paid to her husband during his life.

*Edward Gebhard and Wm. H. Arnoux*, for applt.

*R. D. Harris*, for respts.

*Held*, That a separate trust was

created as to each one of the four shares to continue during the lives of the beneficiaries respectively. 17 N. Y., 561; 72 id., 376; 92 id., 447. No objection can be raised to the direction that on the death of the four beneficiaries his or her share should be transferred to his or her children upon arriving at age. In the direction as to the ulterior contingent remainders the "children" referred to are the children of the first named beneficiaries themselves. The ulterior contingent limitation is quite separable from the primary trust and merely incidental, its only purpose being to provide for a contingency which may never arise, and the failure of which would not affect the general scheme of the testatrix. In such cases an ulterior limitation, though invalid, will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate. 36 N. Y., 543; 17 id., 561; 43 id., 383, 384; 47 id., 389; 5 Den., 646.

The other contingent limitation which limits a trust term for the life of any widow of either of the three sons of the testatrix in the event of his dying without issue is void. 41 N. Y., 328.

The trust during the lives of the three sons and the daughter of the testatrix was valid, of one fourth for each, terminable as to each one at his or her death.

Judgment of General Term, affirming judgment of Special Term, affirmed.

Opinion by *Rapallo*, J. All concur.



## CREDITORS' ACTION.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

George B. Scoville, rec'r, *applt.*,  
v. Bronson A. Shed et al., *respts.*

Decided April, 1885.

A judgment creditor may maintain an action under §§ 1871, 1873, Code Civ. Pro., to establish the interest of the debtor in real estate for which he had paid, but the title to which was in his wife, and to charge such interest with the payment of plaintiff's claim, notwithstanding more than ten years have expired since the recovery of the judgment.

Appeal from judgment dismissing the complaint, entered on decision by the court.

One H., in 1870, recovered judgment against Shed and another for \$642.42, upon which \$83 was collected. Two executions were issued and returned unsatisfied. In March, 1880, plaintiff was appointed receiver of H. and thereby became vested with title to said judgment.

In January, 1878, a farm was conveyed to Mrs. Shed and it is alleged that it was paid for by Shed and the conveyance made to his wife to prevent his creditors from collecting their claims.

This action is brought to recover a judgment declaring that the judgment debtor, Shed, owned or had an interest in the farm and to charge it with the payment of plaintiff's claim through a receiver to be appointed with power to sell. Evidence was given tending to show that the farm was paid for in part by the husband.

The court refused to determine whether the husband had paid for

the farm in part, on the ground that the judgment having ceased to be a lien on real estate the action could not be maintained.

*Wayland F. Ford*, for *applt.*

*O'Brien & Emerson*, for *respts.*

*Held*, Error. The early English cases and some of the early cases in this State held that a bill in equity could not be maintained for the recovery of property unless it was such as was subject to sale under execution; that equity followed the law and that money, stocks, etc., were not enumerated in the statute of 13 Eliz., Ch. 5. This doctrine was exploded in *Spader v. Davis*, 5 Johns. Ch., 280, affirmed 20 Johns., 554. Subsequently the doctrine of the case last cited was somewhat limited in *Donovan v. Finn*, Hopk., 59, which led to the enactment of that section of the Revised Statutes which provided that a judgment creditor might file a bill in chancery against the judgment debtor and any other person to compel the discovery of any property or thing in action belonging to the judgment debtor, or of any property, money or thing in action due or held in trust for him, whether the same might or might not have been originally taken in execution. 2 R. S., 174, §§ 38, 39. This provision of the Revised Statutes is continued by §§ 1871, 1873, of the Code Civ. Pro., and when property is discovered it may be recovered. 2 R. S., 135, § 1; *id.*, 137, § 1. The case at bar is not to set aside a conveyance in aid of the judgment. The judgment debtor never held the legal title to the farm, and setting aside the

deed to his wife would not vest the title in the husband or in any way aid the collection of the judgment by an execution. 15 N. Y., 475. This action is brought under the sections of the Code above cited to recover property paid for by the husband and held by the wife. Should it be established on the trial that this property was paid for by the husband, in whole or in part, his interest therein could be applied in payment of plaintiff's claim notwithstanding the judgment never was a legal lien on the farm, and notwithstanding the fact that more than ten years have elapsed since it was recovered.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### PRACTICE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*T. Jay Griffiths et al., respts., v. Julia A. Phelps, applt.*

Decided April, 1885.

When a question of fact is sought to be reviewed the case should state that it contains all the evidence or all bearing on that question of fact; otherwise, the court will assume that the evidence was sufficient to sustain the finding of fact.

In an action for the purchase price of goods sold through an agent the agent's letter ordering the goods is admissible for the purpose of showing that he sent the order promptly and as agreed.

Appeal from judgment entered upon the report of a referee.

Action to recover the purchase price of 315 pounds of tea sold to defendant through the plaintiff's traveling salesman, the contract

being made with defendant's husband and agent Aug. 28, 1883. The only issue was as to whether the tea was sold at 33 or 32 cents per pound.

The referee found that the agreed price was 33 cents and that plaintiffs shipped the teas Sept. 1, 1883, billing them at that price, and that defendant retained the bill until Sept. 21, and took possession of part of the teas. Judgment was ordered for the full amount claimed.

Defendant claims that the evidence is insufficient to sustain the findings of fact. The case does not show that it contains all the evidence or all bearing on the findings sought to be reviewed.

*Joseph George*, for applt.

*A. J. & I. C. McIntosh*, for respts.

*Held*, That when it does not so appear this court will assume that the evidence was sufficient to sustain the findings of fact. 1 T. & C., add. 4; *id.*, 21; 2 T. & C., 370; 59 N. Y., 649; 2 T. & C., 324; 3 *id.*, 783; 20 Hun, 472; *Ballou v. Ballou*, 4th Dept., October, 1884. When a question of fact is sought to be reviewed it should be stated in the case that it contains all of the evidence, or all bearing on the question of fact sought to be reviewed. Under the present Code an exception to a finding of fact is unavailing unless there is no evidence to sustain it; when it becomes a ruling of law, and an exception is available. Code Civ. Pro. §§ 992, 993; 3 Civ. Pro., 171; 28 Hun, 639; 79 N. Y., 224. If requests to find facts are preferred

pursuant to § 1023 and the court or referee refuses to make any finding whatever an exception may be taken. § 993. But an exception to a finding of fact, or an exception to a refusal to find a fact as requested, is not authorized by the present Code. Whether error has been committed in this respect is to be determined by this court upon the evidence and the requests to find facts. 96 N. Y., 125. Whether a finding of fact is against the evidence may be determined by this court without an exception. 28 Hun, 639; 3 Civ. Pro., 171. It is the duty of the appellant to present a case so made up and settled that the error complained of be manifest, and not leave the court to indulge in presumptions to overthrow decisions. The findings of fact sustain the conclusions of law.

On the trial the letter of plaintiff's agent ordering the goods was received in evidence, not as evidence of the contract price, but for the purpose of showing that the agent ordered the teas promptly, as he agreed to do, and gave the shipping directions agreed upon, the understanding between the salesman and defendant's agent being that the goods were to be ordered through the mails by the salesman.

*Held*, No error.

*Also held*, That no error was committed in receiving the declarations of defendant's husband and general agent. The only declarations proved were those made while negotiating the purchase and trying to adjust the differ-

ences and when offering to sell the teas to another. The husband had testified that the teas had not been taken from the railroad station, and it was competent to contradict him by showing that he had some of the teas in the store and offered them for sale.

*Also held*, That the Statute of Frauds is not in the case. The goods were delivered to the carrier as agreed, part of them were received into the store of defendant and accepted, as found by the referee.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### WILLS. TRUSTEES.

##### N. Y. COURT OF APPEALS.

*In re* accounting of Mason et al.,  
exrs.

Decided March 27, 1885.

Before a legacy can be held to be made in discharge of a debt, or in compensation for services to be rendered by executors, the will must contain language from which such intention can be inferred.

The executors accounted and by the decree the trust funds were separated and their amounts and condition determined, since which time the executors have acted only as trustees. *Held*, That they were entitled to receive commissions as trustees from the time of the accounting in addition to their commissions as executors.

Where a trustee is required to keep trust funds invested and receive and pay out the income annually and he does so, rendering an account to the beneficiary and paying over the balance of income after deducting expenses chargeable thereto, he has the right to deduct full commissions on the income annually received before paying it over, and in such case a settlement before the court is unnecessary.

The nineteenth clause of the will of P. provides: "All the rest, residue and remainder of my estate, real and personal, not hereinbefore disposed of, I give, devise and bequeath unto my friends, Alonzo Wynkoop, Bradley Wynkoop and Francis O. Mason, who are hereinafter mentioned as the executors of this my will, in equal shares." It was claimed that this bequest was made to the executors as a compensation for the services they should render in administering upon the estate. The will contained no language indicating that it was intended to be in lieu of commissions.

*Charles I. Baker*, for applts.

*A. P. Rose*, for respts.

*Held*, That the right of the residuary legatees to take under the residuary clause did not depend upon their acting and rendering services as executors; the bequest to them was a bounty.

Before a legacy can be held to be made in discharge of a debt, or in compensation for services to be rendered by executors, the will must contain language from which such an intention can be inferred.

The first clause of the will provides: "It is my will and I direct that all my just debts and expenses of executing this will be first paid out of my estate." Three trusts were created by the will, which were expected to continue for many years. All of the expenses of the executors as such, including their commissions upon settlement of their accounts as executors, were charged upon and paid out of the residuary estate. The will pro-

vided that the taxes upon the trust funds shall be paid out of their income. By the eighth clause the testator provided that his executors should purchase a house for S., which she might occupy during her life if she paid the taxes, the repairs and insurance; if she failed to do so his executors should take possession of the house, rent it, and, after deducting the taxes, repairs and insurance, pay the balance of the rent to S. It was claimed that all the expenses of administering the trusts created by the will were charged upon the residuary estate.

*Held*, Untenable.

The executors were constituted trustees of three distinct trusts. Property for those trusts was directed by the will to be set apart and the income thereof paid annually to the beneficiaries. In October, 1876, the executors accounted as such, and by a decree of the surrogate the trust funds were separated and their amounts and condition determined. Since then the executors have acted only as trustees.

*Held*, That, in addition to the commissions they were entitled to receive as executors, they are also entitled to receive commissions as trustees from the date of the rendition of their accounts in October, 1876. 95 N. Y., 154; *id.*, 263.

The trustees claimed and were allowed by the surrogate full commissions on the annual income of the trust funds.

*Held*, No error.

Where a trustee is required to keep trust funds invested, and receive and pay out the income an-

nually, and he receives the income and renders an account thereof to the beneficiary, and pays over the balance of the income, after deducting all expenses chargeable against the same, he has the right to deduct for his compensation full commissions on the income annually received before paying it over. 1 Brad., 335; 29 Hun, 10; 69 N. Y., 327; 13 Abb., N. S., 361.

In a case like the present there is no occasion for a settlement before the court, and the law does not require the filing of annual accounts. A different rule might apply if the trustee received income which he was to accumulate, or which he allowed to accumulate in his hands, and then accounted for and paid over a gross sum to the beneficiary.

The surrogate held that upon the termination of their trusts, and the full performance of their duties thereunder, the trustees would be entitled to one-half commissions upon the capital of the trust funds received by them.

*Held*, No error; they will be entitled to have one-half commissions for receiving the trust funds, and the other half for paying or turning the same over to the beneficiaries, whether the funds be then in money or choses in action. 4 Sandf. Ch., 511; 39 N. Y., 202.

Judgment of General Term, affirming decree of surrogate, affirmed.

Opinion by *Earl, J.* All concur, except *Finch, J.*, dissenting, and *Rapallo, J.*, not voting.

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## ADMINISTRATORS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Nellie Whitlock, adm'x., *respt.*,  
v. The Bowery Savings Bank,  
*applt.*

Decided May, 1885.

The payment by a savings bank of money deposited with it by a deceased depositor to his widow, who at the time of such payment was not authorized to collect the debt, is confirmed and legalized by her subsequent appointment as his administratrix, and such payment constitutes a defense to an action against the savings bank to recover the deposit brought by the administratrix *de bonis non* of the depositor's estate appointed after the death of the said widow.

Appeal from judgment recovered on trial before the court without a jury.

In February, 1877, one M. died, having at that time money deposited with defendant, the account standing in the joint names of himself and his wife. On Sept. 12th, 1878, one C., a creditor of M., served written notice on defendant not to pay over any of the moneys belonging to M. except by an order of the court. Subsequently, the bank paid over the balance of M's. account to his widow, who had not then been appointed his administratrix, but who was subsequently so appointed. Thereafter, C. brought an action against the administratrix to recover the debt owed him by M., during the pendency of which the administratrix died and the plaintiff in this action was appointed administratrix *de bonis non* of M's. estate. That

action resulted in a judgment in favor of C. against the plaintiff herein. Subsequently, plaintiff brought this action to recover the amount deposited by M. with defendant, and she recovered a judgment for so much thereof as would pay the judgment recovered against her by C.

*Carlisle Norwood, Jr.*, for applt.

*Solomon F. Higgins*, for resp't.

*Held*, That, assuming that the widow of M. was not entitled to receive the debt created by the money which he had deposited with defendant and that the sole fact of payment to her by the bank would not have protected it from further liability, the further fact of her subsequent appointment as administratrix of his estate, which related back to the time of his decease, confirmed and legalized her act in demanding and receiving payment of this debt. 8 Johns., 126; 2 Hill, 225; 7 id., 181.

That plaintiff, as administratrix *de bonis non* of the estate, was simply the successor in office of the preceding administratrix, and had no further power or authority over the estate than that which she herself possessed at the time of her decease; and, if the administratrix in her life-time had brought the action against the bank to recover the debt, the fact of payment to her before she received the letters of administration would have been a complete and unanswerable defense; and, as plaintiff had no other rights than those of her mere successor, she must be in

the same manner concluded by what had previously taken place, and could not again recover a debt which had in this manner been received by her predecessor in office.

Judgment reversed and a new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady J.*, concur.

### REPLEVIN.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Louis Siedenbach, *applt.*, v. Julia A. Riley, *admrx.*, *resp't.*

Decided May, 1885.

Where a sheriff attached goods under process against one T. and plaintiff claims title through the same person it is entirely irrelevant who owns the goods if T. does not.

A denial of plaintiff's title is not alone a good defense.

If the bill of sale to plaintiff was *bona fide* and was followed by possession, plaintiff is entitled to recover.

A failure to give possession only raises a presumption of fraud, which may be rebutted by proof that the transaction was fair.

There is no need of a demand if the complaint averred an unlawful detention.

Appeal from judgment dismissing the complaint and directing judgment against plaintiff for \$7,440.

Action to recover certain chattels, of which plaintiff claims to be the owner, of the value of about \$7,500, and for damages for the detention thereof.

The chattels consisted of 1,000 Remington rifles, etc.

The answer made by the intestate, who was sheriff of the County of Kings, denied the wrongful detention, averred that defendant had not any knowledge or information sufficient to form a belief that the goods or any part of them were the property of plaintiff, and then proceeded to set forth that, as sheriff of Kings County, on the 29th day of December, 1879, he had seized the property under a warrant of attachment issued in an action in which De Witt C. Farrington was plaintiff, and Roderigo Toledo was defendant, and that at that time the said property was either the property of said Toledo or that he had a leviable interest therein.

The answer did not deny the taking of said property; nor did it allege ownership in the Republic of Honduras.

Plaintiff derived his title to the rifles, &c., by a bill of sale, dated July 21, 1879, from said Toledo, which it was claimed was followed by change of possession within a day or two thereafter, and at the time of the levy of the attachment the chattels were at the Brooklyn Navy Yard on storage, to the order and credit of plaintiff.

On December 29, 1879, some six months later, the attachment before referred to was levied on said chattels, the sheriff claiming they were the property of said Toledo, or that he had an attachable interest therein.

At the trial term, at the close of all the evidence on both sides, the court below dismissed the complaint and directed the jury to

award judgment in favor of defendant (the sheriff) for \$7,440, the value of said rifles.

The ground upon which the court directed a verdict dismissing the complaint, was that by the terms of the contract between "D. W. C. Farrington, treasurer of the Lowell Battery Gun Company, and R. Toledo, Esq., special commissioner for the Republic of Honduras," the property in question was owned by said Republic of Honduras, and denied leave to plaintiff to go to the jury upon the question whether the title to the property was in Toledo at the time he sold it to plaintiff.

*Charles Blandy*, for applt.

*Benjamin F. Butler*, for respt.

*Held*, Error. Both parties claim under the same title; plaintiff claims under a bill of sale from one Toledo and defendant under an attachment against Toledo. It is entirely irrelevant who owns the goods under the pleadings if Toledo does not. The evidence at least presumptively showed a title in plaintiff derived from Toledo and accompanied by possession. Defendant levied upon the property as property of Toledo and there is no claim of title through any other party authorizing the creditor to attack Toledo's title. 67 N. Y., 48. It was always the law in this State that a denial of plaintiff's title alone is not a good defense. 3 Den., 244.

This conclusion leaves only questions of fact in the case. Was the bill of sale a genuine real *bona fide* bill of sale? Was the possession given over of the goods? If

these two questions are answered affirmatively, plaintiff is entitled to recover, for plaintiff's bill of sale and the delivery of possession under it ante-date the levy. Both questions are for a jury. 77 N. Y., 461; 92 id., 529; 71 id., 71.

If the change of possession was not absolute and immediate and continued, the good faith of the transaction may still be shown to the jury, for the failure to give possession only raises a presumption of fraud which may be rebutted by proof that the transaction was fair. In the evidence as taken the proof of change of possession is abundant. If the proof is to be credited all dominion over the property was delivered to plaintiff and received by him. There was no need of an amendment of the complaint in respect to a demand. An averment in a complaint that defendant unlawfully detains plaintiff's property is made out by proof of a demand. It is never necessary to plead the evidence.

Judgment reversed, and a new trial granted, costs to abide event.

Opinion by *Barnard, P. J.*; *Dykman, J.*, concurs; *Pratt, J.*, not sitting.

#### RAILROADS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Annie H. Tanner, *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided April, 1885.

In an action to recover for the loss of plaintiff's goods by fire, it appeared that the car in which they were was drawn

alongside the depot to be unloaded just before the fire; that the depot roof was old, dry, and covered with moss and extended down to the car; that a passing engine emitted sparks which lit on the roof, which took fire and the car and contents were burned. *Held*, That it was a question for the jury whether defendant was negligent in keeping the roof in such condition and the use of engines near it, and in placing plaintiff's goods in such proximity to the depot as to be likely to be consumed and that a refusal to nonsuit was correct.

Appeal from judgment entered on verdict and from order denying motion for a new trial on the minutes.

Action to recover for goods shipped by plaintiff to Rome and destroyed by fire while lying in defendant's cars at that place, Sept. 15, 1881.

The car in which plaintiff's goods were was left near the freight depot a few minutes before the fire, apparently for the purpose of unloading. The depot was an old building, caught fire and was burned, the fire communicating to the car, which was also consumed with its contents.

A witness for defendant testified that the freight house had a roof from peak to eaves of about 40 feet; that the eaves were 7 to 8 feet from the ground; that "the roof was all dry and moss on it;" that it had taken fire on several prior occasions. "I saw an engine going each way about three minutes before the fire started; I saw sparks fly from the engine going east; saw the sparks fly on top of the freight house on the shingles. The sparks were half the size of a walnut. The fire ran



down a number of places like a stream of water. The roof extended down to the cars I think. The smokestack of the engine that I saw emitting the sparks might have been from 15 to 20 inches higher than the eaves." It did not satisfactorily appear that any of the engines were defective. The court refused a motion to nonsuit and left the question of negligence to the jury.

*D. M. K. Johnson*, for applt.

*James Parks*, for respt.

*Held*, That if plaintiff's property was destroyed by reason of defendant's negligence then the language of the receipt and release given by her to defendant when shipping the goods furnish no defense to defendant. The release did not exempt defendant from the consequences of its own negligence. 71 N. Y., 183; 93 id., 537; 86 id., 275; 4 Keyes, 108.

*Also held*, That the nonsuit was properly refused. After the evidence of the dry condition of the roof of defendant's depot had been given and the danger of its igniting it became a question of fact for the jury to pass upon, as to whether defendant was or was not negligent in suffering the roof to remain in the condition in which it was as disclosed by the evidence. If the jury found it was negligent to keep a roof so near the passing engines in such a dilapidated and dry condition as to easily ignite as it did, instead of a slate or metal roof, it was proper for the jury to inquire and say whether such keeping of the roof and use of engines near to it was not negligent. It

was also for the jury to say whether defendant was or was not negligent in placing plaintiff's property in such proximity to the depot as to be in a situation to be consumed by a fire so likely to be kindled by the nearness of the passing engines to the dry, old, moss-covered shingles upon the depot roof. Undoubtedly the burden of showing negligence was upon plaintiff. 39 N. Y., 66; 20 id., 71. Whether defendant was guilty of negligence did not depend upon showing that the engines were defective.

*Collins v. R.R. Co.*, 5 Hun, 502, distinguished.

Judgment and order affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

#### EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Harley D. Winne, applt.*, v. *Gideon Tousley, impl'd, respt.*

Decided April, 1885.

Where, in an action on a promissory note, a witness gives an opinion adverse to its genuineness, a question calling for a comparison of the note in suit with a genuine note by the witness and for a statement of the difference he discovers in the signatures is proper, and a refusal to allow it is error.

Appeal from judgment in favor of defendant entered upon verdict.

Action on a promissory note for \$155 given to plaintiff, signed by S.

G. G., P. K. G., and alleged to have been executed by this defendant. Defense, forgery.

The note in suit was put in evidence and marked exhibit "A." Defendant called on F. T., who testified that he had seen the note in suit and "should think it not his writing." On cross-examination he pointed out certain letters and said, "I judge of this alleged signature on exhibit A from the general appearance of the 'ou' and 's.' All the mark I discover in it that is evidence to me that it is not his signature is that it looks as if that had been made into 'w' and then converted into 'us,' 'tows' instead of 'tous;' all the times I have seen the name it is 'Tous;' you may call it the spelling; I don't know but both ways of spelling it may be correct; some write it one way and some the other. I find no other mark or letter that is an indication to me that it is *not* genuine."

He was then asked, "Describe what difference you can discover between the 'ws' or 'us' in the name of defendant on exhibit A and his name on exhibit D?" Objected to as a question for the jury. The court ruled that it would not be competent.

*Levi H. Brown*, for applt.

*J. C. McCartin*, for respt.

*Held*, Error; that the question was proper, and that plaintiff was entitled to an answer from the witness, who had expressed an opinion which was against the plaintiff, and plaintiff had a right to test the witness and ascertain

the grounds of his opinion. If the court placed its ruling upon the idea that the comparison sought for must be made by the jury alone, the ground cannot be sustained. True, under Ch. 36, Laws of 1880, the jury might make a comparison between the signature upon exhibit A and exhibit D. But that furnishes no reason why plaintiff should not have the question answered by the witness, in order to enable the jury to say what weight they should attach to the opinion of the witness. Both comparisons plaintiff had a right to.

The statute in terms declares "and such writings and the *evidence of witnesses* respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." This follows a declaration of the statute to the effect that a comparison "shall be permitted *to be made* by witnesses in all trials and proceedings."

The ruling took away from plaintiff one of the privileges of the statute by disallowing a witness to state the result and particulars of his comparison so that such "evidence of witnesses" might be "submitted to the court and jury."

We cannot overlook the error or say that it worked no harm to plaintiff. The contest was sharp and resolute upon the trial in respect to the signature. One mode of getting rid of the adverse opinion of the witness was denied by the ruling. 32 Hun, 474; 53 N. Y., 165, 183.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

### STOCK. PLEDGE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Clara F. Vischer, *respt.*, v. Stanley Bagg, *applt.*

Decided April, 1885.

An agreement by which the parties unite in purchasing stock and agree that one shall hold the same until they agree on a sale is not unlawful. Hope or expectation of a rise does not make the contract a wager one. A defense that the transaction sued upon was a wager contract must be pleaded.

Pledges may be retained until the purposes for which they were given have been accomplished.

Appeal from judgment entered upon verdict for \$1,386.03 and from order denying motion for a new trial on the minutes.

Plaintiff's husband and assignor in 1875 entered into a contract with defendant, a broker, for the purchase on joint account of 100 shares of C. C. C. & I. RR. Co. stock at 62½, or \$62.50. The purchase was made and plaintiff's assignor put up a \$1,000 bond with coupons of the Wabash & W. C. C. RR. Co. as margin. Defendant claims to have sold this stock in May, 1880, at 70½. Plaintiff insists that he had no right to sell without giving notice. In Dec., 1880, her assignor demanded the sale of the stock, the price being 82½, and for the return of the bond and an accounting, which was refused.

The answer set up an account for advances, commissions and in-

terest (monthly) for the stock, amounting to \$8,537.68.

The evidence as to the terms of the agreement was conflicting, but as the jury has evidently found, it must be assumed that plaintiff's assignor and defendant became joint owners of the stock; that defendant agreed to carry it until a sale was agreed upon by them, and that the bond was delivered as collateral to the undertaking to carry the stock.

*Hiscock, Gifford & Doheny*, for *applt.*

*T. D. Brewster* and *T. K. Fuller*, for *respt.*

*Held*, That as the answer does not set up that the transaction was illegal and void, defendant cannot now successfully urge such position. 19 N. Y., 37; Van Santv. Pldgs., Moak's Ed., 563; 4 Keyes, 514. It may be said that defendant by demanding affirmative relief waived the supposed illegality. If defendant relied upon a defense that the transaction amounted to a wager contract he should have set up such defense. 77 N. Y., 612; 70 id., 202.

That when Vischer and defendant agreed to buy and jointly own 100 shares of C. C. C. & I. RR. stock, they entered into a contract which by its terms was not unlawful. See 63 N. Y., 383.

The court refused to allow defendant to answer that he bought the stock "for a rise."

*Held*, No error; it sufficiently appeared that the parties expected (as do most people who buy stocks) there would be a rise and better

prices obtained than the purchase price. Hope or expectation of a "rise" does not render the contract a wager one.

*Yerks v. Salomon*, 11 Hun, 471, distinguished.

If the position of plaintiff was taken by the jury to be correct then the inquiry would be next what was the value of the Wabash bond and coupons and how much should defendant be charged therefor. That sum being ascertained a credit would be given of one-half the loss on the stock, and the difference thus ascertained would be presumptively due plaintiff from defendant.

*Also held*, That, treating this action as one for an accounting, defendant was justified in withholding the bond pledged until he should receive the balance equitably due him upon the joint venture. Pledges may be retained until the purposes for which they were given have been accomplished. 53 N. Y., 19; 65 *id.*, 611.

When application was made to defendant by Mr. Brewster, attorney and agent for Vischer, before this action was brought "to close out the stock," "to account," "to deliver the bond," defendant refused to render "any account of the stock or bond." That refusal was too broad. It was not in accordance with the duty of defendant in the premises.

Judgment and order affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman, J.*, concurs; *Follett, J.*, concurs in result.

## COMMON CARRIERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Wm. C. N. Swift et al., *respls.*,  
v. The Pacific Mail SS. Co. and  
The Panama RR. Co., *appls.*

Decided May 8, 1885.

A bill of lading, not accepted by the consignee or owner of the property, made out after the property has been shipped and not received until it is well on its way towards its port of destination, will not have the effect of merging or superseding a preceding contract for the carriage of the property made between the parties and under which it has previously been received by the carrier.

In the absence of any restriction contained in its charter, a corporation engaged in the business of transporting property has power to make a contract for the carriage of property not only over its own route but also over others connecting with it to the place of destination of the property; and it follows from this fact that two corporations engaged in the above business, whose routes connect, can enter into a joint contract with the shipper of goods to carry the same over their continuous routes.

Appeal from judgment recovered on verdict and from order denying motion for a new trial.

This action was brought to recover against the defendants jointly for a breach of a joint contract entered into by them for the carriage from Panama to New York of a certain quantity of oil, the property of plaintiffs, and the delivery of the same to plaintiffs' agent at the latter port. The breach consisted of the failure to deliver a large quantity of said oil which had leaked out of the casks by reason of the alleged negligence of defendants during the transporta-

tion. The liability of defendants was resisted upon the ground that no such contract as was alleged in the complaint had been made by them; that the officer through whose agency it was alleged to have been made had no power to do so as the representative of both defendants, and that bills of lading had been issued by defendants and accepted by plaintiffs by which each company agreed separately to carry the goods over its own line and under which each company was liable only for loss accruing upon its own route.

It appeared that the bills of lading were not issued until the oil had been in the possession of the railroad company for a long time and that copies were sent to plaintiffs which were not read by them and were used only for the purpose of receiving the oil from the ships and passing it through the Custom House.

*Edward Lauterbach, Robert H. Griffin, and William G. Choate, for appls.*

*Austen G. Fox, for respts.*

*Held,* That there was no actual acceptance of the bills of lading as the contract under which the oil was received at Panama and carried to the City of New York, and as they were made out and their delivery secured after the oil was on its way and had passed over the railroad and was on shipboard in its transit to the City of New York, these bills of lading did not have the effect of merging or superseding the preceding agreement, if one was actually entered into, under which the oil was delivered

to and received by defendants. 3 Kern., 569; 25 N. Y., 364; 34 id., 24, 26; 42 id., 316, 319; 45 id., 712.

*Hill v. The Syracuse, B. & N. Y. R.R. Co.,* 73 N. Y., 351, distinguished.

That in the absence of any restriction contained in their charters, the defendants were to be assumed to possess the usual powers of carrying corporations, and such corporations have not been restricted in their authority to contract for the carrying of property over their own designated routes, but as appropriately appertaining to the business in which they are engaged, they have been held to be empowered to make contracts for the carriage of property not only over their own routes, but over others connecting with them to the place of the destination of the property itself, 24 N. Y., 269; 18 Eng. L. & Eq., 553; 82 N. Y., 413; 22 Wall., 123; 107 U. S., 102; 40 N. Y., 168; 45 id., 524; 104 Mass., 122, 133, and as each defendant possessed the power to assume the entire responsibility of the service it would seem to follow both legally and logically from that fact that they could enter into a joint arrangement or contract by which their responsibility would be divided and correspondingly diminished, and which would relate strictly to the business in which they were respectively engaged when the property was designed to be carried over their joint and continuous routes, 4 Seld., 37; 22 N. Y., 258; 53 id., 156; and that the officer

with whom the contract was alleged to have been made, being vice-president of both companies, sustained such a relation to each of them as to be apparently invested with the power to make such a contract on their behalf and that they were bound by his action.

That the existence of the alleged contract was sufficiently proved by the evidence.

Judgment and order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurs.

## FIRE INSURANCE.

### N. Y. COURT OF APPEALS.

Jackson, rec'r, *applt.*, v. The St. Paul F. & M. Ins. Co., *respt.*

Decided May 5, 1885.

In an action by one insurance company against another on a policy of re-insurance issued by the latter, after judgment recovered against the former fixing the amount of loss, the re-insurer cannot inquire into the merits, but is bound to pay such proportion of the loss as its re-insurance bears to the sum originally insured.

Reversing S. C., 19 W. Dig., 485.

This was an action upon a contract of re-insurance. On August 14, 1876, the P. Ins. Co., at San Francisco, undertook to insure one S. against loss by fire \$4,500, as follows: "\$3,000 on his one and one-half story, hard-finished, frame boarding house building, \* \* \* \* \* and \$1,500 on furniture, etc., contained in it." The next day its agent sent defendant an application for re-insurance on its interest as insurer, which was accepted.

A fire occurred and destroyed the property insured to the amount of \$4,100. The P. Co. declined to pay, and judgment was obtained against it for the amount claimed. Plaintiff was subsequently appointed receiver of its property, and brought this action to recover the amount due according to the terms of re-insurance. It was claimed that defendant was not liable for the policy, as it was obtained by misrepresentation.

*Preston Stevenson*, for *applt.*

*N. B. Hoxie*, for *respt.*

*Held*, That when the P. Co. was found to be legally liable upon its contract, and the amount was ascertained, it was not open to the re-insurer to inquire into the merits. It was at once bound to pay the re-insured such proportion of the loss as their re-insurance bore to the sum originally insured.

The policy contained a clause that no action "for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless suit or action shall be commenced within twelve months next ensuing after the loss shall occur." This clause formed part of a blank form intended as an ordinary contract of insurance where the assured had an interest in the property, was required to make proofs of loss by fire and submit to his claims to arbitrators if required, and fulfill many other conditions in no respect applicable to a case where the perils of a con

tract of primitive insurance are involved and where the loss or damage is the amount of liability under it.

*Held*, That plaintiff's right to recover was unaffected by the stipulations of the policy.

Judgment of General Term, reversing judgment for plaintiff, reversed, and judgment for plaintiff affirmed.

Opinion by *Danforth, J.* All concur.

#### TOWN AUDITORS. ACTION. POOR.

##### N. Y. COURT OF APPEALS.

*Osterhoudt, respt., v. Rigney et al., applts.*

Decided March 3, 1885.

An action by a taxpayer to vacate an audit of bills by the Town Board on the ground that such audit was illegal and without authority may be maintained under Chap. 161, Laws of 1872.

A board of town audit has no power to audit and allow claims which have been rejected by a prior board on the merits. Where a portion of such prior claim is included in an audit in such a manner that it cannot be ascertained how much has been allowed for the new legal charge the whole of such audit should be vacated.

Affirming S. C., 14 W. Dig., 566.

This action was brought by plaintiff as a taxpayer of the town of Kingston to vacate the audit of certain bills audited in favor of the defendant R. by the board of town audit at its annual meeting in November, 1878, on the ground that such audits were illegal and without authority. An injunction was asked restraining the collection of the tax.

*F. L. Westbrook* and *Alton B. Parker*, for applts.

*M. Schoonmaker*, for respt.

*Held*, That the action could be properly maintained under Chap. 161 of the Laws of 1872, "An act for the protection of taxpayers against the frauds, embezzlements and wrongful acts of public officers and agents."

It was claimed that the act of 1872 gives a right of action only where before the act an equitable action could have been brought by the town for the same relief.

The statute of 1872 has not abrogated the rule that the acts of a board of audit within its jurisdiction, in the absence of fraud and collusion, are final and conclusive, and cannot be questioned in a collateral proceeding. 2 Den., 26; 45 N. Y., 196-200. The adjudication of a board of audit proceeding regularly within its jurisdiction, establishing a claim against a town, although the allowance may be excessive, or although it may err in its conclusion upon the facts, does not constitute waste or injury to the property of the town within the act of 1872. 6 Hill, 244; 59 N. Y., 620.

A board of town audit has no power to audit and allow claims which have been passed upon and rejected by a prior board. 15 Wend., 262; 6 N. Y., 137; 4 Wend., 453; 35 Barb., 408; 50 id., 573; 2 Den., 26.

If a claim presented is disallowed because not presented in proper form, or not properly verified or accompanied with proper vouchers, or for any reason not involving a

determination upon the merits, the claim has not been adjudicated and may be presented to and passed upon by a subsequent board.

*People ex rel., Hotchkiss v. Suprs., etc.*, 65 N. Y., 222, distinguished.

It appeared that the Board of Supervisors in 1866, pursuant to Chap. 245, of the Laws of 1846, adopted Chap. 334, of the Laws of 1845, as the statute under which the poor of the county should be supported. The overseers of the poor have not followed the system prescribed by the act of 1845 in some respects, but have procured supplies upon their own credit, and presented their accounts annually to the board of audit for allowance and the amount audited was put into the schedule of accounts and levied by the supervisors with other town charges.

*Held*, That the departure from the provisions of the act of 1845 did not deprive the Board of audit of jurisdiction. That while the overseers were not bound to furnish supplies upon their own credit and the act contemplates that they shall be put in funds in advance, it also contemplates that expenditures may be made and liabilities incurred by overseers for the support of the poor beyond the sum raised in advance for that purpose, as in addition to the sum the board of audit shall deem necessary for the support of the poor during the ensuing year the estimate is to embrace such sum as shall be required to "supply any deficiency in the preceding year."

It was claimed that the audit

was invalid because the overseer of the poor omitted to lay his book before the board and the board audited his account without a comparison of the items in it with the items in the book.

*Held*, That these were irregularities merely and did not deprive the board of power to audit the claim.

In the general schedule of town accounts the claims audited to the overseer of the poor were included and in the warrant of the supervisors they were directed to pay the amount in the first instance to the supervisor of the town with direction to him to pay to the overseer.

*Held*, That the act was sufficiently complied with and the direction in the warrant was equivalent to one to pay to the overseers.

In the claim presented by the overseer to the board of audit he included a portion of a claim presented and rejected the year before.

The whole claim was not allowed, but the board of audit allowed more than the claim after deducting the portion improperly included. The referee vacated the audit, holding that it does not distinguish between legal and illegal charges, and that it cannot be ascertained what amount was allowed for that part of the claim not included in the rejected claim of the year preceding.

*Held*, No error.

*Also held*, That assignees of the overseer stand in his shoes and must abide the result reached in respect to him.



*Also held*, That orders given by the board of audit upon the supervisors and accepted by them at the request of the overseer operated at most as an assignment by him *pro tanto* of any money he might be entitled to receive upon the audit, but created no liability against the town or any of its officers. 5 Den., 517.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

#### COSTS. JUSTICE'S COURT.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Abram Goodenough, respt., v. Norman Billings, applt.*

Decided April, 1885.

Where a plaintiff appealed to County Court from a judgment of justice's court against him for costs and on the new trial recovered a judgment for \$8. *Held*, That he was entitled to costs of the appeal.

Appeal from order of County Court, denying motion to strike out plaintiff's costs and disbursements as taxed.

This action was commenced in justice's court to recover \$55 for alleged conversion of lumber. Answer, general denial.

Judgment was rendered against plaintiff for costs, from which he appealed to county court and on the new trial in that court recovered a judgment for \$3. He thereupon taxed the costs and disbursements of the appeal.

Defendant moved to set aside

the taxation, and the County Court denied the motion.

*Frank A. Darrow*, for applt.

*Lyman L. Settel*, for respt.

*Held*, No error; that plaintiff, upon a recovery of judgment by him in the County Court, was entitled to the costs of the appeal. 27 Hun, 593; *id.*, 374; Code Civ. Pro., § 3070, 3238; 25 Hun, 279.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

#### STATUTES. SALARIES.

N. Y. COURT OF APPEALS.

*Mangam, admr., applt., v. The City of Brooklyn, respt.*

Decided April 14, 1885.

The provision contained in § 6 of Ch. 459, Laws of 1877, and § 7 of Ch. 467, Laws of 1879, was not intended to restrict said acts to officers thereafter elected or appointed. It has reference to § 18 of Art. 8 of the Constitution, which does not apply to officers whose salaries are fixed.

This action was brought by plaintiff to recover a balance of \$100, for each of the years 1879, 1880, 1881 and 1882, alleged to be unpaid of the salary of M., her intestate, a policeman in the city of Brooklyn. M. was appointed a policeman prior to 1877. The charter of the city fixed the compensation of patrolmen at \$1,100 per annum. The common council reduced this to \$1,000 under authority conferred by chapter 459, Laws of 1877, an act in relation to the salaries, etc., of officers of the city of Brooklyn, which declares that it "shall not apply to any officers who under

the provisions of the constitution cannot have their fees, percentages or allowances increased during their present terms of office" and the act amending the same. Laws 1879, Chap. 467, § 7.

*Erastus Cooke*, for applt.

*John A. Taylor*, for respt.

*Held*, That plaintiff was not entitled to recover. It is obvious that the legislature in passing said acts had in mind section 18 of Art. 3 of the Constitution, which prohibits the passage of a private or local bill "creating, increasing or decreasing fees, percentages or allowances of public officers during the term for which said officers are elected or appointed." This provision of the Constitution does not apply to officers whose salaries are fixed. The legislature did not, by including said provision in said acts intend to restrict them to officers thereafter to be elected or appointed, but it was inserted merely as a tentative provision to save the act from possible condemnation as being in conflict with the constitution.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Ruger*, *Ch. J.* All concur.

#### MECHANIC'S LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Lawrence Ryan*, applt., v. *Edward M. Klock et al.*, respts.

Decided April, 1885.

A statement in a notice of lien that "60 days have not elapsed since the work was performed and materials furnished" is a

sufficient compliance with the requirement of the Onondaga act that it shall state the date from which the lien is claimed to have commenced, and especially so as against the owner, the contractor or his general assignee.

Appeal from judgment of County Court, dismissing complaint and notice.

One S., who had a contract for building a house in the city of Syracuse, employed plaintiff to perform labor and furnish materials, which he did in Oct. and Nov., 1882. Nov. 22, 1882, S. made a general assignment to defendant K., who in the spring of 1883 completed the building and fulfilled the contract of S., and there remains due from the owner \$360.

Nov. 23, 1882, plaintiff filed two notices of lien, one under the Onondaga act, Ch. 366, Laws of 1864, and the other under Ch. 486, Laws of 1880. In the first notice it is stated that "sixty days have not elapsed since the work was performed and materials furnished." It was dated Nov. 22, 1882.

The court found that the Onondaga act was applicable to the city and to the case in hand, and that the act of 1880 is not applicable to the city of Syracuse. It also found "that the omission of the statement in said notice of lien of the *date* from which he claims it to have commenced is the omission of matter of substance required by the statute as *demanded* to be stated in such notice."

*M. E. Driscoll*, for applt.

*W. M. Ross*, for respt. K.

*Knapp, Nottingham & Andrews*, for owner, respt.

*Chas. B. Goodrich*, for respt. S.

*Held*, That the notice sufficiently stated the time. The first section of the act provides that any person furnishing materials, etc., "shall until the end of *three months after* the performance of such labor or furnishing material be deemed to have an equitable lien for the same" etc. These words furnish a general declaration of the lien, subject of course to the requirements of the statute. (1) "As against the owner of the property himself no notice shall be necessary to establish such lien." 2. As against other persons *who have not any actual notice* of the lien it is provided by the statute that "the only evidence which shall be necessary for a party to signify that he claims such lien shall be the filing of a notice with the county clerk of the county of Onondaga at any time while the building is progressing or within said period of three months \* \* which shall state \* \* the amount thereof *and the date from which he claims it to have commenced*, etc."

The rendition of work and furnishing of materials was clearly declared to be not more than 60 days prior to Nov. 22, 1882, and the assertion of the notice in effect is that in consequence of such work and materials having been so performed and delivered a lien is claimed. It is equivalent to an assertion that the lien is claimed to have commenced when the work was done and the materials were furnished. We think the notice a substantial compliance with the statute and that no objection thereto can successfully be urged by the

owner or by the party who became the general assignee of the contractor and is in no better position than the contractor, who had, as the case discloses, "actual notice" of the claimant's lien created by statute. 10 Daly, 547; 2 T. & C., 76; *id.*, 538; 31 N. Y., 289; 1 E. D. Smith, 687; 65 N. Y., 333; 9 W. Dig, 231.

Judgment reversed and new trial ordered, costs to abide final award of costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

#### APPEAL.

#### N. Y. COURT OF APPEALS.

The Keuka Nav. Co., *applt.*, v. Holmes, *respt.*

Decided March 10, 1885.

Plaintiff purchased certain boats at sheriff's sale subject to a mortgage of \$6,700. Plaintiff claimed that only \$5,700 is due on the mortgage, and brought action to redeem, alleging a tender of \$5,700 and an offer to pay any further sum that may be found due. The court found that \$6,700 was due and that plaintiff was entitled to redeem on paying that sum with interest. *Held*, That there was no ground on which an appeal by plaintiff could be upheld. See S. C., 20 W. Dig., 82.

This was a motion to vacate an order dismissing an appeal in the above entitled action. The complaint sets out a mortgage for \$6,700 upon certain boats, executed by a corporation to defendant, and alleges that plaintiff bought the boats at sheriff's sale upon a judgment against the mortgagor, "subject to the mortgage aforesaid;" that it wishes to redeem the boats from the mortgage and is prepared and

willing to pay defendant the amount due thereon, which as it is informed is not \$6,700 and interest as stated thereon, but is much less, not exceeding \$5,700 and interest;" that a sum of \$1,000 is stated to plaintiff to have been included in the said \$6,700 to be hereafter advanced by her if needed and as needed, but that the same has not been so advanced ;" that plaintiff has tendered \$5,700 and interest and is ready to pay the same, "and any further sum which shall be found due defendant upon an accounting or settlement if such shall be ordered by the court. It being the intention and wish of plaintiff, and plaintiff now offers to pay whatever amount the court shall decree to be due defendant upon said mortgage," and after stating an apprehension that defendant will seek to defeat plaintiff's right to redeem, asks judgment that defendant shall accept such payment and discharge the lien of said mortgage. The answer among other things set up an indebtedness of \$6,700. On the trial at Special Term plaintiff's witnesses testified that the indebtedness to defendant amounted to \$6,700. An attempted tender of \$5,785 was shown, with a notice that it would be deposited in bank to defendant's credit, and "that if any further or greater amount than that above stated shall be found to be due you on said mortgage, we hereby promise to pay the same to you, or deposit it at said bank subject to your order on such being determined." It was also proved that the boats were purchased at sheriff's sale for

plaintiff by its president for \$55 "subject to a mortgage for \$6,700" to defendant. At the close of the evidence plaintiff's counsel moved for judgment allowing plaintiff to redeem, and for an order directing an accounting of the amount due defendant on such mortgage. The court found that \$6,700 was due on the mortgage, and that it was a valid lien in defendant's favor on the mortgaged property; that the sheriff's sale was subject to it, and that a tender was made, as alleged, and held that plaintiff was entitled to redeem by paying to defendant \$6,700 with interest. The parties subsequently stipulated that as the findings did not fix a time in which the redemption should take place it should be within five days after the entering of judgment in the action. Judgment was entered February 2, 1882. The next day plaintiff appealed to the General Term, where the judgment was affirmed.

*John J. Gillette*, for applt.

*W. S. Oliver*, for resp't.

*Held*, That there was no ground upon which the appeal could be upheld, and the motion should therefore be denied.

Motion denied.

Opinion by *Danforth, J.* All concur.

#### ANTENUPTIAL AGREEMENT. STATUTE OF FRAUDS.

N. Y. COURT OF APPEALS.

*Peck, resp't., v. Vandemark, exr., applt.*

Decided April 14, 1885.

It is not necessary under the Statute of Frauds that the whole agreement should be contained in one writing; but where the letters of the respective parties are all connected and relate to each other they may be read together and collectively furnish the written evidence of the agreement.

The surrender by a soldier's widow of her pension on her re-marriage and the marriage itself will furnish ample consideration for an antenuptial promise by the second husband to provide for her by will.

This was an action upon an antenuptial contract made by P., defendant's testator, with the plaintiff. It appeared that in September, 1879, plaintiff was a widow whose husband had been killed in the civil war and she was receiving a pension of \$96 per annum. P. made her an offer of marriage which led to a correspondence between them as to the pecuniary provision he would make to her in case she married him. P. represented that he was worth \$10,000, and the correspondence resulted in a proposition by him to give plaintiff by will one half of his entire property absolutely and the use of the other half during her life. Plaintiff accepted the proposition and married P. March 9, 1880, and lived with him as his wife until his death, June 6, 1881. P. died leaving a will dated April 20, 1881, in which he bequeathed to plaintiff only \$200 in addition to her dower interest in his estate. P. left real estate worth \$5,000 and personal property worth about \$2,300 and a small amount of debts.

*W. H. Adams*, for applt.

*F. L. Manning*, for respt.

*Held*, That the letters that passed

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between plaintiff and P. furnished the written evidence of the agreement required by the Statute of Frauds. It was not necessary that the whole agreement should be contained in one letter. That as they are all connected and relate to each other they may all be considered for the purpose of ascertaining what the agreement was. 1 Greenl. on Ev. (Redfield's ed.) § 268; Wharton on Ev., § 872; Reed on the Statute of Frauds, § 341; Schouler's Domestic Relations, § 177.

*Also held*, That the surrender of the pension and the marriage itself furnished ample consideration for the promise of P. Schouler's Domestic Relations, § 173; 7 Peters, 348; 54 N. Y., 437.

*Also held*, That plaintiff was entitled to recover one-half of the estate absolutely after paying debts and expenses of administration, and the use of the other half during her life; the interest may be computed by the annuity tables provided for such cases.

Order of General Term, setting aside nonsuit and granting new trial, affirmed, and judgment absolute for plaintiff on stipulation.

Opinion by *Earl, J.* All concur.

## WILLS.

### N. Y. COURT OF APPEALS.

*Williams et al., exrs., et al., respts., v. Freeman et al., applts. et al., respts.*

Decided April 14, 1885.

Testator's will directed the executors to divide the residuary estate equally among

certain children named, each to have the use and benefit of one share for life, with reversion of the principal to his or her issue, if any. *Held*, That the children were entitled to the use of their shares and that no trust was interposed between them and the actual enjoyment of the shares.

The will also gave the executors a power of sale and directed that the proceeds and other moneys not needed for immediate use be deposited or invested as directed until a final settlement. No direction was given as to the income and no specific words creating a trust. *Held*, That no trust was created by this provision.

This was an action for the construction of a will. It is reported on a former appeal 83 N. Y., 561. The eleventh clause of the will directs that the residuary estate shall be divided share and share alike among certain of the testator's children, who were named and designated, and that each of said children shall have the use and benefit of one of said shares for life, and at his or her decease the principal thereof is to go to his or her issue, provision being made for the decease of any of said children before the testator.

*Theodore F. Miller and Samuel Hand*, for applts.

*F. H. Kellogg*, for respts.

*Held*, That the children were entitled under this provision not merely to the benefit but to the use of their respective shares, and no trust estate is interposed between them and the actual enjoyment of their shares.

The twelfth clause of the will confers upon the executors a power of sale over the real estate and directs them to keep the pro-

ceeds of such sales and all other moneys of the testator's estate, not wanted for immediate use, deposited or invested as therein directed until a final settlement of the estate. No direction is given as to any disposition of the income of these funds, nor are any apt words used to create a trust in respect thereof other than such as resulted from the relation of the executors thereto by virtue of their office.

*Held*, That no trust was created by this provision; it was merely a direction as to the temporary custody of the funds till the final settlement should take place, that is the final settlement of the accounts of the executors when the debts and expenses of administration should be paid and the shares of the residuary legatees respectively ascertained as directed by the will.

Judgment of General Term, reversing judgment of Special Term, reversed, and that of Special Term affirmed.

Opinion by *Rapallo, J.* All concur.

## APPEAL.

N. Y. COURT OF APPEALS.

The People, *applts.*, v. Poucher, *respt.*

Decided April 14, 1885.

An appeal from an order of General Term granting a new trial in a criminal action will not lie to the Court of Appeals unless the order shows that the new trial was refused upon the facts and was granted only for errors of law.

This was an appeal from a judgment of the General Term, revers-

ing a judgment convicting the respondent of the crime of grand larceny and granting a new trial. The order of the General Term does not state upon what ground or for what reason the judgment of conviction was reversed.

*Ceylon H. Lewis*, Dist. Atty., for applts.

*John Hallock Drake*, for respt.

*Held*, That the appeal should be dismissed. When in the exercise of its discretion the General Term refuses to grant a new trial, such discretion is not reviewable in this court.

An appeal to this court from a judgment of conviction brings up for review only questions of law. Unless, therefore, the order of the General Term shows that the Supreme Court has exercised its discretion, and refused a new trial upon the facts and granted it only for errors of law, there is nothing for this court to review. 92 N. Y., 560.

Appeal dismissed.

*Per curiam* opinion. All concur.

#### TRESPASS. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Abram I. Oliver*, respt., v. *William H. Freligh*, applt.

Decided June, 1885.

Defendant inherited the land in dispute from his father, who was dead at the time of the trial of this action for trespass. As a witness in his own behalf plaintiff testified that he cut timber on the disputed land in the presence of defendant's father, and that their conversation at the time was friendly. *Held*, That the evidence was improper under Code, § 829.

The action was for cutting trees on land claimed by both parties. Defendant inherited the land from his father, who was dead at the time of the trial. Plaintiff testified in his own behalf and, under objection, said that after he bought the property he cut timber on the disputed land. He was asked by the court whether old Mr. Freligh knew that fact. He answered that he did; that he came along there. The witness said that his conversation with old Mr. Freligh was friendly. He was asked whether anything else was said at that time, and answered, nothing more than common friendly conversation. Plaintiff had a verdict.

*J. Clute*, for applt.

*J. W. Mattice*, for respt.

*Held*, That the evidence was inadmissible under Code, § 829. 95 N. Y., 316. The object of the testimony was to show that plaintiff exercised acts of ownership over the disputed land in the presence of the deceased Freligh, and that the latter, either by not objecting or by talking in a friendly manner, showed that he admitted plaintiff's rights.

Judgment reversed.

Opinion by *Learned*, P.J.; *Bockes* and *Landon*, JJ., concur.

#### CIVIL DAMAGE ACT. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Esther Ford*, respt., v. *John P. Ames*, applt.

Decided June, 1885.

Under the Civil Damage Act, Chap. 646, Laws of 1873, the complaint need not allege a sale or giving of liquor to the intoxicated person if it state the facts required by the statute.

A complaint alleged that defendant sold or gave away intoxicating liquors at a certain place; that said liquors caused the intoxication of plaintiff's husband; that in consequence of such intoxication he was drowned; that by reason of such intoxication caused as aforesaid and of the death of her husband plaintiff, who was wholly dependent upon her husband, was injured, etc. On demurrer, *Held*, that the complaint was sufficient.

The complaint alleged that defendant kept a certain place at Ogdensburgh at which intoxicating liquors were sold; that on a certain day while defendant was running said bar plaintiff's husband, Amos, became intoxicated at said city; that said intoxication was caused in whole or part by intoxicating liquors sold or given away by defendant, his agents or servants, at and upon said place; that while so intoxicated and in consequence of said intoxication plaintiff's husband was drowned; that she was wholly dependent upon him; that by reason of his intoxication, caused as aforesaid, and of his death, caused by said intoxication, plaintiff had been injured, etc. Defendant demurred upon the ground that the complaint did not state that the liquors were sold to plaintiff's husband. The demurrer was overruled.

*William Peters*, for applt.

*L. M. & L. K. Soper*, for resp't.

*Held*, That the complaint was good. The demurrer admits that by reason of the intoxication of Amos Ford, caused as stated in

the complaint, plaintiff has been injured in her property and means of support; that said intoxication was caused in whole or in part by intoxicating liquors sold or given away by defendant. This admits all the facts which the statute, Chap. 646, Laws of 1873, says gives a right of action. It admits that defendant sold or gave away intoxicating liquors at a certain place; that these liquors caused the intoxication of Amos Ford; that by reason of such intoxication, viz: through the death of Amos Ford caused thereby, plaintiff, his widow, who had been wholly dependent upon him for support, was injured in her property and means of support. We need not decide whether the statute implies a selling or giving to the intoxicated person. It must certainly be enough in a pleading to aver facts which come within the language of the statute. 2 Sandf., 518. And it is not clear that if two persons go to a retail dealer's shop and one of those persons "treats" the other and that other becomes intoxicated, the retail dealer may not be liable. Yet it could be argued that he neither sold nor gave to the intoxicated person. And therefore it may have been intentional that the statute was not limited to a sale or giving to the intoxicated person. Such may have been the circumstances of this case.

Interlocutory judgment affirmed and leave to answer over on payment of costs.

Opinion by *Learned, P.J.*; *Bockes, J.*, concurs; *Landon, J.*, dissents.



## APPEAL. MANDAMUS.

N. Y. COURT OF APPEALS.

The People ex rel. Dowdney,  
*applt.*, v. Thompson, Com'r of  
 Public Works, *respt.*

Decided May 5, 1885.

An appeal will not lie to the Court of Appeals from an order of General Term reversing an order granting a mandamus in a case where, according to relator's contention, he has a sufficient remedy at law.

See S. C., 19 W. Dig., 455.

This was an appeal from an order of General Term, reversing an order of Special Term granting a mandamus commanding the respondent to execute a contract to the relator. It appeared that the relator, in response to an advertisement, submitted a proposal for the work, in the proper form, duly verified, accompanied with an agreement, also properly executed by the proposed sureties, and a certified check on a city bank for five per cent. of the amount of the security required as provided by the statute. Upon opening the bids the relator was found to be the lowest bidder who had conformed to the provisions of the notice or the requirements of the statute. The contract was awarded to another party whose bid was lower than relator, but who had not deposited a check on a city bank as required, the check accompanying his bid being on a State Bank. The relator claimed that this was such a defect and irregularity as to require the rejection of the bid.

*Morgan J. O'Brien*, for *applt.*  
*D. J. Dean*, for *respt.*

*Held*, That if the relator's contention is well founded he is absolutely entitled to the contract, because under § 308 of the Laws of 1861 it must be deemed "confirmed in and to him" at the time his bid was opened; then he has a sufficient remedy at law to recover his damages, and the court was not absolutely bound to grant the writ of mandamus and could in the exercise of its discretion refuse it. 72 N. Y., 496. That discretion is not reviewable here.

Appeal dismissed.

*Per curiam* opinion. All concur.

## EXECUTORS. DISCOVERY.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re* examination of Cornelius A. Slingerland relative to assets of the estate of Ten Eyck.

Decided June, 1885.

All the executors or administrators should join in an application under Code, § 2706, to discover property alleged to be withheld from them; and generally all should join in any proceeding unless the Code expressly gives a less number power to act.

An order made under § 2706 is one affecting a substantial right.

An appeal therefrom is analogous to an appeal from an order requiring a party to be examined before trial.

One of two administrators took this proceeding. For Slingerland, the party to be examined, it was shown that letters of administration had been issued to another administrator. A motion to dismiss the petition upon this ground was denied.

*N. C. Moak*, for *applt.*  
*J. F. Cooper*, for *respt.*

*Held*, That both administrators should have joined. The use of the phrase "an executor" in § 2706 is not controlling. It is a familiar rule that the singular should be construed to embrace the plural where good sense requires. And it will be seen by reference to § 2750 that where it was intended that one executor of several might take a special proceeding this was expressly stated. It being, then, expressly stated what proceedings one of several may take, the fair inference is that all must act when the contrary is not expressly provided.

Order of surrogate reversed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, J.J.*, concur.

### SAVINGS BANKS.

#### N. Y. COURT OF APPEALS.

The People v. The Third Ave. Savings Bank.

Decided March 24, 1885.

A deposit was made with defendant by a man who gave his name as S. and a pass-book was issued to him. Thereafter one V. being in prison, a stack of hay on his farm was sold, and at the bottom the pass book was found, and afterwards given to V.'s administrator. A precise duplicate of this book was presented to the receiver of defendant by a man who answered the description of the depositor, and his signature comparing favorably with the original signature, a dividend declared was paid to him. On a claim by V.'s administrators for said dividend, there was no evidence as to who S. was, or that there was such a person, nor that the book was ever seen in V.'s possession; there was evidence tending to show that the depositor's signature was in V.'s hand-writing. *Held*, That the burden was on the claimants to establish that V.

made the deposit, and that the proof was not so conclusive that the court was bound to believe that he did; that the receiver was protected by his payment made with due care and diligence.

On April 23, 1869, a person deposited \$1,880 in the Third Avenue Savings Bank which was entered in book No. 36,770, which was delivered to him. He gave his name as Henry Seaman, his occupation nurseryman, and Yorktown, Westchester Co., N. Y., as his residence, and wrote his signature. He stated that he was born in 1844. At that time one Henry Vail resided at Yorktown. He was a farmer and married, and was between thirty and forty years old. He is described as "a man generally in trouble, a thief, a miser and a penurious miserable member of human society." In 1872 he was sentenced to Sing Sing prison for a term of years, and died there in 1875. A short time after he was taken to prison a stack of hay was sold at a vendue on his farm, and the purchaser in removing it found near the bottom of the stack in a short piece of stove-pipe, closed at both ends, a deposit-book issued by said bank to Henry Seaman, No. 36,770, containing a credit for a deposit of \$1,880. Said purchaser kept the book until after the death of Vail, when he delivered it to one of his administrators. In June, 1881, after a receiver of said bank had been appointed, a person presented to the receiver's clerk a deposit-book apparently issued by said bank in the name of Henry Seaman, and demanded payment of a dividend declared on said account. The book contained

the whole account as it was entered upon the books of the bank and was a precise duplicate of the book found in the hay-stack. The person presenting it was questioned as to his name, age, occupation and residence, and answered the description given by the actual depositor in April, 1869. The receiver's clerk compared the signature of the latter with that of the person presenting the book for payment, and believed them to resemble each other sufficiently, and paid the dividend to him. Vail's administrators subsequently applied for an order directing the receiver to pay the dividend to them, and a referee was appointed to take proof of the facts and report the same to the court. He reported that the receiver had used ordinary care and diligence in making the payment, and that the petition should be dismissed. An order to this effect was made which was affirmed by the General Term. There was no evidence to show who Henry Seaman was, or whether there was any person by that name. There was evidence tending strongly to show that the signature of the depositor in 1869 was in Vail's handwriting. There was no proof that the book was ever seen in his possession.

*Samuel C. Mount*, for applt.

*Thomas Allison*, for resp't.

*Held*, That the burden rested upon claimants to show that the deposit was made by Vail and to establish their title to the deposit-book. The proof was not so conclusive or strong that any court was bound to believe that

Vail made the deposit. As a contrary conclusion could be drawn from the evidence, the question having been decided adversely to Vail's administrators this court is concluded thereby. Code, § 1337.

*Also held*, That if the deposit was made in the name of Seaman by Vail, and the deposit book was issued to him, the evidence would justify the inference that a duplicate pass-book was issued to Vail, and that he transferred it or that the same came into the hands of some one who drew the dividend; that the payment having been made with due care and diligence the receiver is entitled to the protection given to such a payment by the regulations and by-laws of the bank printed in the deposit book. The receiver takes the place of the bank, and must have the same protection in making payments. 62 N. Y., 12; 69 id., 314.

*Also held*, That if Vail deposited the money in the name of Seaman, with the false descriptions, and a deposit book was issued to him, his administrators were properly defeated, as by making the deposit as he did, and by secreting the deposit book in such an unusual manner, he created the confusion, doubt and difficulty which subsequently misled the receiver, if he was misled.

Exceptions taken to the exclusion of evidence upon the reference in this case cannot brought into this court for review. The Supreme Court was not bound to send the matter back to the referee to receive the excluded evidence or any further evidence.

Order of General Term affirming order denying petition, affirmed.

Opinion by *Earl, J.* All concur, *Andrews* and *Danforth, JJ.*, on first ground.

#### BANKS. OFFSET.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Francis G. Hall, *respt.*, v. The Tioga National Bank, *applt.*

Decided April, 1885.

Under an arrangement between banks by which the bank collecting checks sent by the other is to remit any balance found due the other by draft on N. Y., less exchange, the collecting bank is not entitled to offset against the proceeds of a check collected the amount of a check previously accounted for, the amount of which it has repaid on a claim that it was forged.

Appeal from judgment entered on verdict, and from order of Special Term denying motion for new trial.

Plaintiff sues as assignee of the Second National Bank of Elmira, which had an arrangement with defendant, as alleged in the answer, by which it was agreed that for checks sent by said Elmira bank to defendant for collection or payment defendant should remit any balance due to said Elmira bank by draft on some New York bank, deducting for exchange. It was stipulated that such an arrangement existed, by which defendant was allowed one-eighth of one per cent. on sums less than \$500, and one-tenth of one per cent. on sums in excess thereof, for exchange.

The Second National Bank of Elmira sent to defendant Feb. 16,

1881, checks amounting to \$145.50 for collection. Prior thereto and in Dec., 1880, defendant collected of the First National Bank of Owego, and remitted to the Elmira bank for a check of \$35. Some six weeks after it was claimed that the payee's name was forged, and upon such claim defendant refunded the \$35 to the First National Bank of Owego. In remitting the \$145.50 collected in Feb., 1881, defendant sent the \$35 check and a draft for \$110.36, retaining 14 cents for exchange. This the Elmira bank refused to receive in settlement of its claim.

*Chas. A. Clark*, for *applt.*

*J. McGuire*, for *respt.*

*Held*, That the verdict and judgment are right. It may be conceded that defendant became entitled to recover back from the Second National Bank the amount of money theretofore paid by it to the Second National Bank for and on account of the check. Did that right of recovery give to defendant in this case the right to offset the check against the proceeds of the \$145.50 checks, without the consent of the Second National Bank? We think not. The agreement as represented by the stipulation, the answer or evidence does not give that right. When the arrangement was entered into by the banks it is not probable that the officers of either bank anticipated any such occurrence. They contemplated the ordinary transactions arising daily between banks collecting for each other; that one might have collections to settle for, and in ascertaining what sum should be re-

mitted a balance might be struck by deducting the credits arising the day the balance was to be ascertained in the comparison of current items of the day's business. They were dealing with fixed facts represented by checks, notes or drafts of unquestioned validity, to be taken into account in ascertaining "balances." Whereas, in the case of the \$35 check, there was a question to be settled as to whether the endorsement was a forgery or not, and if it was forgery whether the Second National Bank would admit it and acknowledge its liability to refund monies paid to it in December, 1880, for that check. We think it quite clear that the agreement as to current daily balances did not embrace a transaction such as the return of monies claimed through an averment of forgery. This conclusion is reached without taking into consideration the relation of creditor and debtor between the two banks and by assuming that each was bound to respect its agreement to turn daily balances into drafts and remit in that manner. If, however, it be assumed that defendant became indebted to the Second National Bank, then its right to set off the \$35 check or a claim by reason thereof would be clear. If that be the relation the parties held to each other, as the court below seems to hold, then defendant was required to plead and keep good a tender, and having failed to do so would be liable for the balance found due plaintiff as assignee *as a debtor*. In either view of the case the judgment is right.

Judgment and order affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

### PROMISSORY NOTES.

#### N. Y. COURT OF APPEALS.

*In re* accounting of Waldron, assignee.

Decided March 27, 1885.

The assignor was a member of a firm which formed a partnership with another firm and later a corporation was organized which assumed the debts of the partnership. Certain notes of the corporation being due to a bank which was pressing for payment an arrangement was made by which the assignor and his original partners gave their joint and several promissory notes for the debt and the security held therefor was transferred to them. *Held*, That a claim on the notes was properly allowed as a separate debt of the assignor; that the bank dealt with the makers as individuals and not as a firm and that there was sufficient consideration for the note.

This proceeding was instituted before the Judge of Saratoga County, by the assignee of D., for an accounting. The only claim in controversy was one by C., as the holder of two notes, by which D. and two other individuals "jointly and severally" promised to pay to their own order the sums named in the notes at a bank mentioned, with interest. The notes were properly indorsed and the evidence disclosed that they were originally delivered by the makers to the bank, and after maturity sold and assigned by the bank to C. It was claimed that these notes were in fact obligations of the firm of D. & L., composed of the makers of the

notes, and therefore not a charge upon the assignor's separate property, but only on the surplus after his individual debts were paid. After hearing proof in support of and against the claim, the county judge ordered that it "be allowed as a separate debt of Dunsbach in due course of distribution of the assets in the hands of his assignee." This order was affirmed by the General Term. It appeared that prior to the date of the notes a firm existed under the name of D. & L.; that afterwards a partnership under the name of the C. L. C. & P. Co. was formed by the firms D. & L. and Y. & Co., and later a corporation was organized under the name of the C. L. & C. Co., which assumed the debts and took the property of the partnership, and its capital stock was issued to the firm of D. & L. and Y. & Co. and Y. It did not appear that the firm of D. & L. was ever actually dissolved, but it might be inferred from the evidence that its business was merged first in the firm and afterwards in the corporation already named. It was proved that the notes in suit were part of a transaction between the makers and the National Bank of C. That bank then held three notes of the C. L. C. & P. Co. amounting to \$6,975, and one note of \$3,000 made by the C. L. & C. Co., all of them past due. It held as collateral thereto a certificate of stock in the C. L. & C. Co. of \$1,000 received from Y. The bank knew that D. & L. were members of the firm and of the corporation when said notes were given. It was

pressing them for payment and threatening to sue, and they claimed they were not liable. The claim was the subject of negotiation for six weeks, during which time D. was at the bank once or twice a week. A settlement was effected by which the bank threw off \$975, transferred to D. & L. the certificate of stock, and received three joint and several notes, each of \$3,000, in form like the one first above described, and signed and endorsed in the same way, all of which was required by the cashier, the three makers being present. One of these notes was paid by L. personally and \$2,000 on another by D., a new note being given for the remaining \$1,000 signed by the same parties and of the same form. There was also evidence tending to show an understanding that the notes were to be regarded as partnership notes.

*N. C. Moak*, for applt.

*Henry A. Merritt*, for resp't.

*Held*, That the order of the county judge was correct; that the bank in effecting the settlement dealt with D. & L. as individuals, and by so doing secured an advantage which it has a right to retain. 77 N. Y., 138. There was an express agreement established by the written promise to pay creating a separate liability as to each of the three signers of the notes; that as the bank insisted upon dealing with the promisors as individuals, and in consequence of their assent the original debt by which others were bound was satisfied or transferred, there was a sufficient consideration for the agreement which

the parties were competent to enter into.

Order of General Term, affirming order of County Judge, affirmed.

Opinion by *Danforth, J.* All concur.

## NEGOTIABLE SECURITIES. RAILROADS.

### N. Y. COURT OF APPEALS.

*Ellsworth, ex'r., respt., v. The St. Louis, A. & T. H. RR. Co., applt.*

Decided April 14, 1885.

The right of a *bona fide* holder for value of a negotiable bond issued by a railroad company to recover thereon is not affected by the fact that the railroad sold the bonds at a discount contrary to the provisions of their charter, which forbade the sale of them at less than their par value.

A foreign corporation sold its bonds in the city of New York, the principal and interest being payable there. *Held*, That they were New York contracts and valid here although there were provisions in the charter of the company which would make them illegal in the State where the charter was granted.

Affirming S. C., 19 W. Dig., 869.

This action was brought to recover the amount of thirty bonds issued by the defendant. It appeared that the defendant, a railroad company organized under the laws of another State, sold three hundred of its bonds in the city of New York, the principal and interest of which were payable there, among which were the bonds in suit; that these bonds were sold in violation of a restriction in the company's charter as to the price for which it could sell its bonds. This fact was not known to the plaintiff.

*George A. Strong*, for applt.

*William A. Coursen*, for respt.

*Held*, That the contract was in all respects a New York contract; that there is nothing in the laws of this State which rendered it illegal, and even if defendant's charter should be so construed as to contain prohibitions which would have rendered the contract illegal in the State where the charter was granted, they would have no effect here except as restrictions upon the power of the corporation or its officers.

Plaintiff being a *bona fide* owner of the bonds, the fact that they were originally negotiated contrary to the provisions of defendant's charter could not be received to defeat his recovery. 1 Black, 386; 1 Wall., 93.

A railroad corporation has a general power to make contracts and to borrow money, and persons dealing in securities issued by it may, in the absence of notice to the contrary, assume that restrictions upon this power have not been violated.

Order of General Term, setting aside verdict for defendant, affirmed.

Opinion by *Rapallo, J.* All concur.

## EVIDENCE.

### N. Y. COURT OF APPEALS.

*Langley, respt., v. Wadsworth, ex'r., applt.*

Decided April 14, 1885.

In an action on a promissory note defendant put in evidence letters written by plaintiff and asked a direction for judgment "in view of these letters," which was denied. *Held*, That if he relied on the ground that the letters showed the note

to be without consideration he should have called the attention of the court to that point.

So far as the cross-examination of a witness relates to facts in issue or relevant facts it may be pursued as matter of right; but when its object is to test the accuracy or credibility of the witness, its method and duration are subject to the discretion of the court.

A witness cannot be cross-examined as to any fact which, if admitted, would be collateral or irrelevant, and which would in no way affect his credit.

This was an action upon a promissory note. The complaint set up a good cause of action. The answer was a general denial. Upon the trial it was assumed by both parties that plaintiff when she rested had given evidence which, unless disproved, would justify a verdict in her favor, and the defendant took the burden. With other evidence he introduced letters written by plaintiff to his testator, the alleged maker of the note, and at the close of the case he asked the court "to direct a verdict for defendant in view of these letters." The court declined to do so and defendant excepted. The exception then taken is now placed upon the ground "that they showed the note to be without consideration."

*Adelbert Moot*, for applt.

*Henry F. Allen*, for respt.

*Held*, That if in making his exception defendant relied upon the ground now claimed, the attention of the court should have been called to it. 75 N. Y., 340.

So far as the cross-examination of a witness relates to facts in issue or relevant facts it may be pursued by counsel as matter of right, but when its object is to

ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused its exercise is not the subject of review, nor can the witness be cross-examined as to any facts which, if admitted, would be collateral and wholly irrelevant to the matter in issue and which would in no way affect his credit.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth*, J. All concur, except *Andrews*, J., absent.

## TRUSTS.

### N. Y. COURT OF APPEALS.

*In re* petition of *Waring et al.*

Decided April 28, 1885.

A. consigned his real estate and personal property to B. and took back two agreements indicating that the property was conveyed to enable the grantee to carry out certain purposes. Subsequently an agreement in writing was made by both which recited that the prior agreements constituted a declaration of trust and that B. held the property in trust for said purposes. *Held*, That the facts were sufficient to authorize the court to determine that an apparent legal trust was created and that some of its objects remained unperformed at the death of B. and these facts authorized the appointment of a trustee by the Supreme Court.

Affirming S. C., 21 W. Dig., 120.

On November 8, 1876, the petitioner, E. W., conveyed to W. E. W. all his real estate by a deed without covenants, upon the consideration expressed of \$10, and out of natural love and affection. At about the same time he presumably delivered his personal proper-



ty to said W. E. W., and the same, with said real estate, remained in the possession of said W. E. W., and he continued to manage and control it until his death, October 5, 1882. By his will W. E. W. gave all his real and personal estate to F. W., and under it she has taken possession of and now holds the above described property. It may be inferred from the proof that simultaneously with the transfer of said property W. E. W. and E. W. executed two several agreements in writing indicating that the property in question was conveyed to enable its grantee and assignee to carry out and execute certain purposes designed, which were expressed in said agreement. Subsequently on March 16, 1881, an agreement in writing was made between said W. E. W., E. W. and C. G. S., wherein it was recited that the agreements above referred to constituted a declaration of trust as to said real estate, and it was also declared that said W. E. W. held said personal property in trust for certain purposes which were also declared by or inferable from the language of said agreement. Upon the death of W. E. W. the petitioners applied to the Supreme Court for the appointment of a trustee in his place to execute the trust, all of the parties interested as beneficiaries having joined. The application was made under section 81, of article 2, title 2, chapter 1, part 2 of the Revised Statutes (6th ed.) 1110.

*H. H. Anderson*, for applts.

*Beach & Brown*, for respts.

*Held*, That the facts proved

were sufficient to authorize the court to determine that an apparent legal trust was created in the property described by the conveyances and agreements referred to, and that some of its objects remained unperformed at the time of the death of W. E. W. These facts authorized the appointment of a trustee by the court below, and after having performed that duty the determination of any other questions involved should have been left to the result of an action regularly instituted to accomplish that purpose.

Order of General Term, affirming order appointing a trustee modified by striking out so much thereof as assumes to adjudicate upon the validity of the trust, and as modified affirmed.

Opinion *per curiam*.

All concur.

## TOWN BONDS.

### N. Y. COURT OF APPEALS.

*Alvord*, admr., *applt.*, v. The Syracuse Savings Bank et al., *respts.*

Decided April 14, 1885.

The legislature may, by direct enactment, impose the characteristics of commercial paper on municipal bonds, and may declare innocent purchasers of such bonds, when they are issued by the proper officer having apparent authority, to be *bona fide* holders and as such protected.

Under Chap. 571, Laws of 1868, the purchaser for value of bonds issued under that act had a right to rest on the determination of the assessor and the act of the commissioner, and was not bound to go behind them.

The board of town officers mentioned in

§ 1 of that act is the board of town auditors.  
Affirming S. C., 20 W. Dig., 158.

This was an action in equity for the cancellation of certain municipal bonds, in the hands of innocent holders, after the town for more than ten years had steadily paid the accruing interest without question or protest. The action is brought by two of the taxpayers of the town, under Chap. 161, of the Laws of 1872, re-enacted in the Code (§ 1925), which authorizes the taxpayers to maintain an action against any officer or agent of a town to prevent waste of its corporate property; and is prosecuted on an appeal to which the railroad commissioner of the town, originally joined as a defendant, is not a party. The railroad sought to be aided has been constructed and put in operation upon the line originally stipulated, and the town and its residents have received the precise, and full, and agreed compensation for which the bonds were issued. Defects in the bonds were set up, most of which are available at law, and it is aimed to justify a resort to equity on the ground that the bonds operated as a mortgage on the taxpayers' property and clouded their titles. The statute under which the bonds were issued provides (Laws of 1868, Chap. 571, § 7), that "all bonds issued by the commissioner of the several towns aforesaid shall be valid and binding upon the towns represented by such commissioner in the hands of *bona fide* holders or owners thereof," &c. It appeared that evi-

dence of the consents of the requisite number of taxpayers had been filed as required by the act before the bonds in question here were purchased. It was claimed that this action could be maintained because such requisite consents had not in fact been obtained.

*Cornelius E. Stephens*, for applt.

*George F. Comstock*, for respts.

*Held*, Untenable; that defendants' title could not be questioned.

The legislature may by direct enactment impose the characteristics of commercial paper upon municipal bonds, and bring them within the rules of protection devised for the safety of innocent holders, and may declare innocent purchasers of such bonds, when they are issued by the proper town officer who was clothed with apparent authority, to be *bona fide* holders and as such protected.

*Cagwin v. Town of Hancock*, 84 N. Y., 532; *Craig v. Town of Andes*, 93 id., 405, distinguished.

Under the statute governing the present case the purchasers for value of the bonds had a right to rest on the determination of the assessor and the act of the commissioner and were not bound to go behind them.

Authority was given by said act (Sec. 1,) to the "board of town officers" to appoint the commissioner.

*Held*, That the board of town officers should be construed as meaning the town board, being certain officers of the town occupying different positions and having no

common designation, who meet together and act together as a board representing the town in auditing claims against it.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Finch, J.* All concur.

## MASTER AND SERVANT. NEGLIGENCE.

### N. Y. COURT OF APPEALS.

Burke, admr., *respt.*, v. Withbee et al., *appls.*

Decided April 14, 1885.

A master is not obliged to furnish his workman with best known or best conceivable appliances, but those which are reasonably safe and suitable for the work; such as the master, as a prudent man, would furnish if his own life were exposed to the dangers of the work.

Reversing S. C., 18 W. Dig., 369.

This action was brought to recover damages for the death of B. plaintiff's intestate, alleged to have been caused by the defendants' negligence. The defendants were co-partners in an iron mine, and B. was killed while at work for them in a pit, by being hit by a car used for raising ore, which in some unaccountable way became unhooked from the cable by which it was raised and lowered into the mine. It was not claimed that there was any defect in the car or track or cable, but plaintiff insisted that there should have been a bolt between the hook fastened with a key, thus confining the cable, or that the cable should have been attached to the bale by means of a

socket or clevis, with a bolt or key so as to fasten them securely together. It appeared that there were two cars in this mine so that one could be loaded while the other was being drawn up. As one car came down it ran upon a side track and the cable was then taken off and placed on the other car which had been loaded and was drawn up. It was important to change the cable quickly as a car passed up and down every ten minutes. It was proved that in this and other mines where two cars were thus operated the hook was always used on account of the facility with which the change from one car to the other could be made. When but one car was used it was customary to fasten the cable to the bale with a clevis or socket with a bolt through fastened with a key, but that such a mode of fastening would not answer where two cars were used, because too much time would be taken up in changing the cable, and there would be no economy or advantage in the use of two cars. It appeared that the hook for fastening the cable to the car had been in use in this mine for several years and had also been used in other mines in different parts of the country, and prior to this accident had never failed to answer its purpose. It was in plain sight and no objection had been made to its use by any of the defendants' employees.

*M. D. Grover*, for *appls.*

*A. W. Boynton*, for *respt.*

*Held*, That defendants could not be held to have been guilty

of a want of that ordinary care, diligence and foresight which as employers they owed to their employees. 84 N. Y., 455. They were not obliged to furnish their workmen with the best known or best conceivable appliances, but those that were reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or defective appliances.

As in the transaction of a large business economy, cheapness, facility and convenience for the necessary operations are the fundamental conditions of success, they cannot be lost sight of. While they may not and frequently do not consist with the greatest safety for those engaged in the business, they may and should consist with that reasonable care on the part of the master for his servants which a prudent man would under the same circumstances take of his own person.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Earl, J.* All concur, except *Ruger, Ch. J.*, and *Danforth, J.*, dissenting.

#### COMPROMISE. PRACTICE.

##### N. Y. COURT OF APPEALS.

Graham, ex'r, *applt.*, v. Meyer, *respt.*

Decided April 14, 1885.

A debtor has the right to make the best compromise with his creditor that he can, using no fraud or culpable artifice to accomplish that result. Each party to

such a compromise has a right to the advantage his superior skill, foresight and knowledge may give him.

Before a compromise of a disputed claim can be annulled on the ground of fraud the creditor must restore the money paid him with interest, and restore to the debtor his right to appeal from the judgment, if any, previously recovered on said claim, if such right has been lost by lapse of time.

A new trial should not be granted where upon the pleadings and the facts as found it appears that there is a good defense.

On May 20, 1859, G., plaintiff's testator, recovered in the U. S. Circuit Court a judgment against defendant for \$243,204.42. On the next day defendant made a general assignment for the benefit of his creditors, preferring all of them to G. The claims of the preferred creditors amounted to \$250,000, and the property assigned was worth about \$400,000. Defendant at once took measures to have the judgment obtained by G. reviewed. In November, 1859, G. commenced a creditor's suit against defendant and his assignees to set aside the assignment as fraudulent and to reach the assigned property for the satisfaction of his judgment. While these conditions existed, G. and defendant, in the winter and spring of 1860, through their respective agents, entered into negotiations for a compromise and settlement of the judgment, which resulted in the payment to G. of \$109,850, in full satisfaction and discharge thereof. In the summer of 1866 G. brought this action to set aside said compromise and satisfaction, on the ground that they were procured by the fraudulent representation of defendant and

his attorney as to the amount and condition of his property. It appeared that after paying the preferred creditors and the sum agreed upon for the compromise of the judgment, there remained of the assigned estate which came to defendant between \$30,000 and \$40,000. There was no proof that defendant or his attorney knew with any certainty how much property would remain to defendant after paying the preferred creditors and the amount of the compromise. Defendant made no representations and did nothing to mislead G. or to prevent him from inquiring or to throw him off his guard.

*S. P. Nash and William J. Gibson*, for applt.

*Bernard Roelker and Joseph H. Choate*, for resp't.

*Held*, That plaintiff was not entitled to recover; that there is no sufficient basis for imputing to defendant or his attorney any undue concealment; that the compromise was not an unreasonable or unwise one for G. to accede to; that defendant was not bound to make any disclosure of his financial condition; he was not the trustee, but bore the simple relation to G. of debtor, and had the right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage his superior skill, foresight and knowledge may give him. 75 N. Y., 62; 85 id., 622; 18 id., 489; 1 Wend., 583.

*Also held*, That the compromise must be treated as one of a dis-

puted claim, and before it could be annulled on the ground of fraud G. must restore to defendant the money paid to him with interest, and restore to him, so far as possible, his right to prosecute his writ of error to the Supreme Court from the judgment, in case for any reason by the lapse of time he had lost it. 86 N. Y., 75.

This court should not grant a new trial when, upon the pleadings and all the facts of the case as found by the trial court, it appears that there is an absolutely good defense to the action.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Earl, J.* All concur.

## BANKS.

### N. Y. COURT OF APPEALS.

*Craigie et al., respts., v. Hadley*, recr., *applt.*

Decided May 5, 1885.

The acceptance by an irretrievably insolvent bank of the deposit of drafts just before the final closing of its doors constitutes such a fraud as entitles the depositor to reclaim the drafts or their proceeds.

Neither the creditor of an insolvent bank nor its assignee in bankruptcy has any equity to have such deposit applied in payment of the obligations of the bank.

A repayment of such deposit does not constitute a preferential payment under the Bankrupt act.

This action was brought to recover the proceeds of certain drafts, which were deposited by plaintiffs in the usual course of business with the bank of which defendant is receiver between two and three

o'clock of the afternoon of April 13, 1882, and were credited in plaintiffs' pass-book, and on the books of the bank to their account. The bank closed its doors at the usual hour on that day and never opened them afterwards. It turned out that it was irretrievably insolvent and had been so for months before its failure.

*Richard Crowley*, for applt.

*Sherman S. Rogers*, for respts.

*Held*, That the acceptance of the deposit under the circumstances constituted such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds. 67 N. Y., 598.

The presumption that the managing officers and agents of the bank had notice of its condition arises from the circumstances. Notice to an agent of a bank or other corporation entrusted with the management of its business, or of a particular branch thereof, is notice to the corporation in transactions conducted by such agent acting for it, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion. 72 N. Y., 286; 2 Hill, 452.

It was claimed that plaintiffs' right to reclaim the drafts or their proceeds is precluded by sections 5234 and 5242 of the United States Revised Statutes, which forbid all preferential payments or transfers by an insolvent bank and provide for a ratable division of its assets among its creditors.

*Held*, Untenable; as plaintiffs do not claim under a transfer from the bank, but under their original

title. Their relation as creditors terminated when they elected to rescind the contract. Neither the creditor of an insolvent bank nor its assignee in bankruptcy has any equity to have the property of persons situated as the plaintiffs applied in payment of the obligations of the bank.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Andrews, J.* All concur.

## SURROGATES. POWERS.

### N. Y. COURT OF APPEALS.

*Hyland et al., admrs., appls., v. Baxter et al., respts.*

Decided April 14, 1885.

A surrogate has power and authority by implication to make an allowance for past maintenance of infants upon an accounting of executors or administrators in a case where such expenditure would have been authorized if an application had been made in advance.

His determination on such a question is conclusive upon the parties until set aside or reversed.

On May 27, 1862, one B. died, intestate, leaving a wife and three children, the oldest of whom was about eight years old. H., plaintiff's intestate, and the widow were appointed administrators. No guardian was appointed for the children until May, 1872, when one Z. was appointed. He applied for an accounting by H., and on the return of the citation H. appeared and presented his account, and it was referred to an auditor to examine and report. It appeared on the accounting that, after payment

of debts and expenses of administration and the distributive share of the widow, there remained \$827.50 for distribution to the children under the statute. After the death of their father in 1862 they continued to live with their mother, the co-administrator of H., who cared for, supported and maintained them as one family, the means for such support being supplied by H. at her request. These advancements were set out in the account presented by H. to the surrogate and he claimed that they should be credited to him in the accounting. The auditor reported that H. had paid over and delivered to his co-administrator all the avails of the estate for which he was chargeable, and that the distributive shares of the minors were expended by her in providing them necessities during their minority and under such circumstances that if she had been their general guardian the expenditure would have been allowed her on her accounting as such. The auditor further reported that H.'s co-administrator had no right as such to make such payments and the surrogate had no power on the accounting of the administrators to allow them as a credit in their account. The surrogate disallowed the claim and, pending an appeal from the surrogate's decree to the Supreme Court, this action was brought to have the amount advanced and expended for the support of minor children applied in deduction or extinguishment of the sums adjudged against the administrators on ac-

count of the distributive shares of said minors.

*William F. Cogswell*, for applts.

*Charles J. Bissell*, for respts.

*Held*, That the plaintiffs' claim was in the nature of a claim for an allowance for past maintenance; that a court of equity has power to make such an allowance out of the estate of infants. 4 Johns. Ch. 105. An allowance for past maintenance may be made to executors, trustees or guardians upon an accounting or upon a petition, even when it requires a breaking in upon the capital, provided the expenditure for which reimbursement is sought would have been authorized by the court if an application had been made in advance. 4 Ves., 369; 5 id., 194; 9 id., 285; 26 Beav., 634; 2 Williams on Executors, 1272; 2 Leading Cas. in Equity, 720.

While no express authority is conferred upon a surrogate to make an allowance for past maintenance upon an accounting of executors or administrators, he is authorized to direct and control their conduct and settle their accounts, and to administer justice in all matters relating to the affairs of deceased persons according to the statutes of this State. 2 R. S., 220, § 1, subd. 3, 6. The limitation, following the enumeration of the powers granted to the surrogate, that "they shall be executed in the cases and in the manner prescribed by the statutes of this State," does not confine the exercise of his jurisdiction to such acts only as are expressly authorized, but his jurisdiction is subject to the general principle governing the construction of

powers, that an authority conferred for a particular purpose carries with it by implication such incidental powers as are requisite to its complete execution. 11 N. Y., 324; 24 id., 46; 84 id., 479. A surrogate's court has jurisdiction to determine questions either legal or equitable arising in the course of proceedings in the execution of powers expressly conferred, and which must be decided therein. 7 Paige, 591; 74 N. Y., 476; 89 id., 479.

*Also held*, That the determination of the surrogate is *res adjudicata*, and is conclusive upon the parties until set aside or reversed. 6 N. Y., 190; 90 id., 512.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Andrews, J.* All concur.

### WILLS.

#### N. Y. COURT OF APPEALS.

*In re* accounting of Yates, exr.

Decided April 14, 1885.

Testator by his will gave all his property, real and personal, to his wife "to have and hold the same, and to receive and enjoy as her own property, the rents, issues and profits therefrom," for life in lieu of dower. He left two farms and on them agricultural implements, live stock and farm produce, which the executor did not include in his account. *Held*, That testator intended that the widow should enjoy and use the property as he had done and in the same form in which he left it, and not that the executor should sell the personal property and pay her only the income on the proceeds.

One Y. died leaving a will, by which, after providing for the payment of his debts, he gave and be-

queathed to his wife all his estate both real and personal "to have and to hold the same, and to receive and enjoy as her own property, the rents, issues and profits therefrom" during life, the same to be in lieu of dower. After her death he gave a farm of fifty acres to one son, whom he made executor of his will, and another farm to another son and certain grand-children. All the rest, residue and remainder of his estate both real and personal at the death of his wife he gave to said sons and said grand-children. Y. died October 5, 1875, leaving two farms adjoining each other, and upon them a quantity of tools and agricultural implements, one harness, some horses, cows and hens and a quantity of hay, oats, corn, wheat and potatoes. In the Spring of 1882, the executor was called to account by his brother and the grand-children of the testator mentioned in the residuary clause of his will. It appeared that the executor had paid the debts of his testator from the avails of personal property sold by him. His account was objected to because he had omitted to charge himself with the agricultural tools, implements and harness, potatoes, hay, corn and wheat which were on the farm of the testator at the time of his death. A referee to whom the matter was sent found that the agricultural implements, tools and harness did not belong to the testator, and held that the executor was not accountable for the hay, oats and other farm produce which it appeared had been disposed of by the widow.



*Jerome Squires*, for appls.

*Geo. E. Goodrich* and *J. N. Hammond*, for respt.

*Held*, That in giving to his widow his real and personal property for her enjoyment during life the testator intended that she should possess and use it in specie. It cannot be inferred in view of the facts that the testator wished the executor at the moment of his death to sell all the personal property, and pay over to his wife only the interest which might accrue upon the proceeds or that he intended to bestow upon her a farm without the means of making it available. It is rather to be inferred that until her death she was to enjoy and use the property as he had done and in the same form in which he left it. 2 Myl. & K., 699, 704; 1 Myl. & C., 114; 2 Lans., 43.

Judgment of General Term, affirming decree of surrogate, affirmed.

Opinion by *Danforth*, *J.* All concur.

# EMINENT DOMAIN. AWARD.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*In re* the N. Y., W. S. & B. RR. Co., v. *Theophelia G. Townsend*.

Decided June, 1885.

An award made by commissioners to appraise lands required by a railroad company will not be set aside after confirmation for the failure of the company to pay, especially when it appears that no demand has been made upon the company by the land owners and that the latter has appealed.

Where it appeared that soon after the ap-

pointment of a commissioner his son was made station agent of the company and was such during the time of his father's service as commissioner, *Held*, that the commission was not impartial and its report must be set aside.

Appeal from order confirming the report of commissioners appointed to appraise lands to be taken by the company. A motion was also noticed to set aside the report and award on the ground that the company has failed to deposit the money as required by the order and is insolvent.

*Schoonmaker & Linson*, for applt.

*F. L. & T. B. Westbrook*, for respt.

*Held*, That the rights of the respective parties became vested on confirmation. 78 N. Y., 56. They stand substantially like purchaser and vendor of land. The general rule is that when no time is appointed by the contract a demand must be made in order to put the other side in default. It does not appear here that any demand has been made on the company. Further, the owner of the land has appealed and it is uncertain whether the report of the commissioners will stand. We think the award should not be set aside for the failure to pay.

It appears however that one of the commissioners was *Amasa Humphrey*. A few days after his appointment as such his son was appointed telegraph operator at *Saugerties* by the company, and two months later station agent. We think it was improper for *Amasa Humphrey* to act after his son's appointment and that the re-

port should be set aside. Under the circumstances it cannot be said that the land owner has permitted him to act without objection and should not now be heard to object. Amasa Humphrey was unobjectionable when appointed. The company by its own act has made his son its servant, and whatever motives may have influenced them in the selection we think it clearly wrong that his father should thereafter be a commissioner. Besides the land owner also says she did not know that after the commission had been appointed a member who had become disqualified could be removed. We think it very probable that she did not know this.

Report set aside and commissioners discharged.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

### TAXATION.

#### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *appls.*, v. Dwight Hagadorn et al., *respts.*

Decided June, 1885.

A board of supervisors fixed the equalized valuation of a town and entered the same in the assessment roll; it determined the amount of tax to be raised and its rate, delivered its warrant for the collection of the tax affixed to the assessment roll to the supervisor of the town and adjourned *sine die*. It had previously directed the supervisor to extend the amounts of taxes against each of the persons and their property named and described in the roll. He did so. *Held*, That the warrant was void and that plaintiffs got no title by a purchase at a tax sale under the same. Where the comptroller sells lands for non-

payment of the taxes for several years, the taxes for some of which years are regular and for other years void, the void taxes will invalidate the sale.

The action was trover for cutting logs and the State claimed title under a deed of the comptroller to it. He bid the lands in for it according to statute. The sale was in 1877, and the lands were sold for the taxes of 1866, 1867, 1868, 1869 and 1870. The taxes for 1866 and 1867 were valid. As to those of the remaining years the facts were as stated in the head note. Defendants had a verdict.

*D. O'Brien*, Attorney General, for *appls.*

*Geo. W. Smith*, for *respts.*

*Held*, That the judgment should be affirmed. We do not think that the estimating and setting down the sums to be paid as a tax was a mere clerical duty which could be performed after adjournment. See 1 R. S. p. 195, m. § 33. And § 37 of the same article says that the warrant shall require the collector to collect from the several persons the sums mentioned in the last column of the roll. Here the last column was blank when the Board adjourned. 51 N. Y., 510; 58 id., 401.

It is said the sale was valid because nothing is shown against the validity of the taxes of 1866 and 1867. But by Ch. 427, Laws of 1855, § 44, so much of each parcel shall be sold as will pay the taxes, interest and charges. If there be no bid the comptroller bids for the People. § 66. The amount which must be paid is the amount mentioned in the certificate with 10 per

cent. interest. § 50. That is, the amount of the taxes, interest and charges, and 10 per cent. interest thereon. It follows that there can be no separation of the taxes of several years. The notice required to be given for redemption must state an amount which includes all the taxes for which the lands were sold. § 61. In order to redeem the owner must pay both the legal and illegal taxes. We think this vitiates the sale.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

## WILLS. LEGACIES.

### N. Y. COURT OF APPEALS.

*Stimson, exr., et al., respts., v. Vroman, exr., et al., appls.*

Decided April 14, 1885.

Testator by his will bequeathed to his wife "The sum of five hundred dollars, payable yearly and every year out of the income of my estate," and to his daughter he bequeathed a bond and mortgage for \$2,000 against D. It appeared that the income of the estate, exclusive of the bond and mortgage, was not sufficient to pay the legacy to the wife. *Held*, That the provision for the widow is the dominant one and that it was the duty of the executors to hold the mortgage during the widow's life and use the interest towards making up the annuity, and upon her death to transfer the mortgage or its proceeds to the daughter.

Reversing S. C., 17 W. Dig., 118.

The will of V., after providing for the payment of his debts, gave to his wife and his daughter E. "the use and income of the house and lot wherein I now reside during the lifetime of my said wife, together with the sum of

\$500 yearly, and every year, by my executors hereafter named, out of my income, of my estate, the same to be in lieu of dower." Upon the death of his wife he directed his executors to sell his house and furniture and out of the proceeds pay to E. \$3,000, to K., a daughter of a deceased son, \$100, and to each of the two daughters of a deceased daughter \$100, "whenever they find sufficient money in their hands to do so, and if either of my three granddaughters should not be living, I will that theirs shall be equally divided between the survivors." The will further directed the executors to pay to his daughter M., \$1,800, and to his daughter C., the wife of one of the executors, a mortgage for \$2,000, held by the testator against her husband. The remainder after paying the above legacies to be equally divided between his daughters M., E. and C. The will then gives unto the testator's three sons his house and lot, bank stock and other securities in the city of Brooklyn, \$5,000 to one, \$1,000 to another, and the balance of said Brooklyn property to be equally divided between the testator's three sons. "And if there should not be sufficient property to pay all my bequests, then each legatee is to share the deficiency in proportion to the several sums divided to them." The will further provided that if the testator sold the Brooklyn property in his lifetime the proceeds should be divided as above stated. At the time of his death the testator owned the house and furniture in Schenectady

devised to his wife and daughter and the house in Brooklyn, the \$2,000 mortgage mentioned in the will, \$2,500 of Commercial Bank of Brooklyn stock, a note for \$1,250 of the executor V. who resided in Brooklyn, and a claim for \$100 against the executor S. for money loaned a short time before his death; the testator's debts were few and small. It did not appear that the testator's widow had any estate of her own. His daughter E. was unmarried and lived at home. The executors accounted and it appeared that the executor V. had paid to the widow, to apply upon her annuity, all the income of the Brooklyn property including his note, after deducting certain small payments for debts and funeral and other expenses, and there remained a balance still due her. It also appeared that the wife of the executor S. claimed the \$2,000 mortgage from her husband to the testator as a specific legacy, and he had as executor assigned it to her. The surrogate charged S. with the mortgage and with interest thereon during the life of the widow and with \$100 borrowed money of the testator. From that portion of the decree S. and his wife appealed to the General Term where the decree so far as appealed from was reversed and the proceedings remitted to the surrogate for a resettlement. The executor V., the widow and the other legatees appealed from the order of the General Term to this Court. It was claimed that said order was not appealable.

*Alexander J. Thomson*, for applts.

*S. W. Jackson*, for respts.

*Held*, Untenable; that the order of the General Term was final so far as it pertained to any judicial action and was therefore appealable. 67 N. Y., 199.

*Also held*, That the provision in the will for the widow is the dominant one, all the others being subordinate to it. The direction that the annuity is to be paid out of the entire estate must have effect. It is the duty of the executors to hold the mortgage during the widow's life and use the interest from it towards making up her annuity. In case it is paid in the income of the proceeds should be taken for the widow's annuity and upon her death the proceeds should be paid to the wife of S.

Judgment of General Term, so far as it reversed the decree of surrogate, reversed, and decree of surrogate affirmed.

Opinion by *Earl, J.* All concur.

#### GIFT. BANKS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respt.*, v. The State Bank of Fort Edward, *applt.*

Decided June, 1885.

A husband to quiet and appease his wife deposited money to her credit in the defendant bank and gave to her a bank book showing the deposit. At the same time he told the cashier it was his own money and he would let it rest in that way for a short time. The wife drew checks against the account which the bank paid and charged to her account. The wife died. The bank be-

came insolvent. *Held*, That a perfect gift to the wife of the deposit was made out and that the husband could not reclaim the money as against other creditors.

This is a proceeding in the above entitled action. John Osgood, the petitioner, in May, 1883, deposited \$900 in defendant to the credit of his wife, Sarah, and gave her the bank book. In the following June and July she drew checks on this fund which were paid. A receiver of defendant was appointed in September, 1884. When he took possession Sarah Osgood had a credit of \$856. John Osgood's individual account was overdrawn \$313. He now asks that this overdraft be offset against the amount due by the books to Sarah and that the balance standing in her name be transferred to his credit. He showed that this deposit was only made to quiet his wife, who was ill and feared he was about to fail; that the money deposited was his; that he so told defendant's cashier when he made the deposit, and that he said to him that he would let the amount rest in that way for a short time. Sarah died in September, 1883. In April, 1884, the cashier agreed with the petitioner that the amount of a check which the latter was about to draw and of future checks should be paid out of the deposit of Sarah. The petitioner's account was then about exhausted. The checks were drawn by petitioner (which caused the overdraft of \$313) but were charged to his account. Subsequently to this an administrator of Sarah was ap-

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pointed. He and the next of kin concede the money in question is the property of John Osgood, and never was the property of Sarah. It was so held below.

*D. S. Potter*, for receiver, applt.

*Edgar Hull*, for respt.

*Held*, Error; as the bank is insolvent the rights of creditors intervene. Hence the consent of the administrator and next of kin are of no effect. There was no consideration for the agreement made in April, 1884, by the cashier with the petitioner; and such an agreement was not within his powers as cashier, the depositor's consent not having been obtained. Whatever was the intention of the parties we think a perfect gift of the deposit to Sarah is made out. She drew checks on the deposit which was to her credit. Her husband could not have reclaimed the deposit nor could the bank have denied its liability to her. The bank, in fact, charged her checks against the account. 89 N. Y., 286, is a somewhat similar case.

Order reversed.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs; *Bockes, J.*, doubts.

### CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Isaac Sommers et al., *appls.*,  
v. Oliver H. Brigham, *respt.*

Decided June, 1885.

Defendant took a conveyance of personal property and of a hotel business, and in consideration thereof agreed to pay the

debts of the grantors and assignors as soon as he was able to do so. In an action by a creditor of the grantors upon this clause plaintiff gave no evidence of defendant's ability to pay. It appeared, however, that defendant had conducted the hotel business at a profit, had paid upon mortgages which were on the personal property when he bought; had paid other creditors of the grantors and that there was an equity in the mortgaged personal property. *Held*, That the plaintiffs were properly nonsuited.

Emma L. Brigham, wife of defendant, and one O'Connell were partners in keeping a hotel. In June, 1884, Emma L. conveyed personal property in the hotel and the hotel business to Wm. H. Brigham and he to defendant; and O'Connell also conveyed the same direct to defendant. The bill of sale from O'Connell to defendant contained a clause by which defendant agreed to pay all debts against the firm of Brigham & O'Connell as soon as he was able to do so. Plaintiffs, creditors of the firm, sued on this agreement. They did not prove defendant's ability to pay, but relied for this proof upon the fact that defendant had conducted the hotel at a profit and that he had paid other creditors of Brigham & O'Connell. Defendant testified that when this suit was brought he was not able to pay plaintiffs; that when he took the bill of sale the debts of Brigham & O'Connell were \$16,000, of which \$11,000 was secured by chattel mortgages; that he was compelled to pay on the chattel mortgages or lose his furniture; that he had paid the rent of the hotel; that he had paid, besides that, on the chattel mortgages and

on debts of the firm of Brigham & O'Connell about \$2,000 in all. Plaintiffs asked to go to the jury on the question of defendant's ability to pay. This was denied, and a nonsuit granted.

*Preston & Chipp*, for applts.

*E. D. Brandon*, for resp't.

*Held*, That the nonsuit was proper. The only evidence which can be said to touch the question of ability was that of defendant, where he says the chattel mortgaged property was worth \$14,000 and was mortgaged for \$11,000. If the transfer of this property to him is to be taken to show defendant's ability to pay, then there was no meaning in the clause which states that he is to pay when he is able. Because on that supposition he was able at once. Plainly some other ability was contemplated in that clause. The payment of other debts does not show defendant's ability to pay this one. Perhaps it showed less ability. And he was under no obligation to pay *pro rata*.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

#### BUILDING CONTRACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Austin J. Slade, *resp't.*, v. Barbara A. Cherry, *applt.*

Decided June, 1885.

Plaintiff made a written contract with specifications to build for defendant a house. Upon the trial evidence was admitted that the materials furnished were

as good as were ordinarily used in much more expensive houses; also that they were of the same quality and grades as lumber the prices of which plaintiff's husband, acting as her agent, had inquired the prices of shortly before. *Held*, That upon the question of substantial performance the evidence was competent.

The action was brought to recover a balance due upon a contract to build a house to cost \$700. Defendant set up that plaintiff did not perform the contract according to its conditions. Under objection plaintiff was allowed to prove by one Comstock that he sold plaintiff the lumber for the house; that it was as good as any he sold for a house that costs \$3,000; that some of it was the same grade used by the trade in building houses of the description of the house in question; that the lumber was of the same kind and grade as that for which he had a short time before furnished prices to defendant's husband. The court charged, in this connection, that if the witness furnished lumber the same that Mr. Cherry was expecting to have put in the building it would be strong evidence to show that it was what was intended by the parties. Defendant excepted to this, and asked the court to charge that the inquiries of Cherry and statements of Comstock could not be used in construing the written contract. The court declined. Plaintiff had a verdict.

*C. S. Lester*, for applt.

*James W. Verbeck*, for respt.

*Held*, That the rulings were proper. All that defendant could exact was a substantial perform-

ance of the contract. And upon this question Comstock's evidence was at least harmless. Upon the question of strict performance, it would not have been proper. But if a builder had put in material equally good with what was required by the contract it would be unjust to refuse him his compensation because of a slight variance. And in this view evidence that the material was as good as was ordinarily used in a house of much greater value might bear on the question of substantial performance. This question is one of fact. 62 N. Y., 256. So the inquiries of Cherry, acting as his wife's agent, as to the prices of lumber may indicate that the lumber furnished was in substance a compliance with that contracted for. Further, it does not appear from the exceptions (which with the judge's charge are all that is brought before us) that any evidence was given as to the expense necessary to rectify the alleged defects. So that no allowance could be made for them. 81 N. Y., 212. It is not unreasonable to conclude that the defects were not substantial.

Judgment affirmed, with costs.

Opinion by *Learned, P.J.*; *Bockes, J.*, concurs; *Landon, J.*, dissents.

#### HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William Cousins, *applt.*, v. Lewis Carncross et al., *com'rs. respts.*

Decided June, 1885.

In an action against commissioners of high-

ways for an accident caused by a hole in a bridge, the referee found that none of the defendants had any knowledge prior to the accident that the bridge was out of repair, and that no wilful omission of duty had been established upon the part of any of them. *Held*, That the report in favor of defendants must be set aside. Such commissioners owe to the public an active duty—the duty of inspection of highways within reasonable periods, and one question always is whether, under the circumstances, they were bound to know of the defect; and this apart from any question of actual knowledge or wilful neglect.

A horse was injured by falling into a hole on a bridge. There was evidence that the hole had existed a month before all the commissioners came in office. There was no defense of a want of funds or the power to raise them. The referee found as stated in the head note.

*Poste & Robinson*, for applt.

*W. H. & G. C. Sawyer*, for respts.

*Held*, That the report must be set aside. It seems to us that the referee must mean in his report by the words "no knowledge," actual knowledge. He does not find that defendants had not been negligent in failing to examine and discover the condition of the bridge. The doctrine of these cases is well settled. 44 N. Y., 113; 44 How., 1; 14 Hun, 177. These commissioners are not to be merely passive, waiting until some person shall inform them that a bridge is out of repair. They are bound to reasonable inspection and remedying of defects found to exist. If the referee had found that defendants had not been neglectful of their duty, and

that the defect had not existed long enough to make them responsible for not repairing it, we should be disposed to regard this as a question of fact on which his decision should stand. But he has not done so. All that he has found may be true and defendants may still be liable.

Judgment reversed.

Opinion by *Learned, P.J.*; *Bockes and Landon, JJ.*, concur.

### PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Fannie S. Petrie, admrx, *respt.*,  
v. The Ogdensburgh & Lake Champlain R.R. Co., *applt.*

Decided June, 1885.

Where after the jury has retired to deliberate counsel desire to take exceptions to the charge the court has the right to and it is the proper practice for him to recall the jury and hear the exceptions in their presence.

This was an action for damages caused, as alleged, by defendant's neglect. While the jury were retiring defendant's counsel said he desired to except to certain parts of the charge, whereupon the court called the jury to resume their seats and said he would hear the exceptions in their presence. To this defendant excepted and insisted upon his right to take exceptions after the jury had retired and in their absence.

*Louis Hasbrouck*, for applt.

*James & Hermann*, for respt.

*Held*, That the practice was proper. An exception may call to the court's attention some remark



inadvertently made or it may suggest to the court some error in his charge.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

## EMINENT DOMAIN. CORPORATIONS. PLEADING.

### N. Y. COURT OF APPEALS.

*In re* petition of the N. Y., L. & W. RR. Co., to acquire lands of the Union Steamboat Co.

Decided April 14, 1885.

If the material allegations of the moving affidavit or verified petition in a special proceeding are not denied by some counter affidavit they stand sufficiently proved for the purposes of an ultimate order; so held where the allegation of due incorporation of the petitioner was only met by an allegation that repliant had no knowledge or information sufficient to form a belief on the subject.

The signing of the articles of association of a railroad company by agent is good unless such signature was made without authority, and that fact must be proved by the party attacking its validity.

The fact that a railroad company has leased its line for the full period of its existence will not prevent it from instituting proceedings to condemn land for its corporate use.

Land used by a steamboat company organized under a charter which does not make it a common carrier or impose public obligations upon it is not so devoted to the public use as to protect it from condemnation under the general railroad act.

Affirming S. C., 21 W. Dig., 29.

The petition in this matter, which was verified, affirmatively alleged the due incorporation of the petitioner. The counter affidavit of the land owner did not deny this positive allegation of the peti-

tion, but alleged that it had no knowledge or information sufficient to form a belief on the subject. The petitioner gave no further proof of incorporation beyond a statement sworn to in the petition. The land owner insisted that an issue was raised on that subject by the answering affidavit and the burden was still upon the petitioner. The referee ruled otherwise.

*George B. Hibbard*, for applt.

*John G. Milburn*, for resp't.

*Held*, No error; that treating the answer of the land owner simply as an affidavit it fails to contradict the positive averment of incorporation; that treating it as an answer there is no sufficient contradiction of the petitioner's pleading viewed as a complaint, for the Code provides, § 1776, that the plaintiff corporation need not prove its corporate existence unless the answer is verified and contains an affirmative allegation that the plaintiff is not a corporation.

Section 15 of Ch. 140, Laws of 1850, apparently provides that the land owner even without filing a counter affidavit or answer may still disprove any of the facts alleged in the petition. This leaves him with the burden of proving that the petitioner is not a corporation or of contradicting proof to that effect.

In a special proceeding the moving affidavit or verified petition if full and complete is ordinarily a sufficient basis for an order founded upon it. If its material allegations are not denied by some counter affidavit they stand sufficiently

proved for the purposes of an ultimate order. 77 N. Y., 563.

The land owner introduced in evidence the articles of association filed by the petitioner, which purported to be executed by twenty-five different persons, the execution of four of them being by an agent.

*Held*, That the signing of the articles by the agent was good unless they were signed without authority; that such fact would not be presumed, but must be proved by the land owner. 67 Barb., 295; 66 N. Y., 407.

It appeared that the petitioner had been leased for the full period of its corporate life to a corporation organized under the laws of Pennsylvania.

*Held*, That this did not prevent them from instituting proceedings for the condemnation of land for its corporate uses. 67 N. Y., 327.

It was claimed that the land sought to be condemned had already been so devoted to the public use as to protect it from condemnation to another public use. It appeared that the premises in question were used by the landowner, a steamboat company, as a dock or wharf for the landing or delivery of a portion of its freight. The steamboat company was organized under Chap. 232, Laws of 1854. Its charter did not make it a common carrier or impose upon it public obligations.

*Held*, That the land in question was not protected from condemnation under the general Railroad Law.

Land already held upon a public trust by the authority and under the ward of the State is exempt from proceedings to take the same under the right of eminent domain. 53 N. Y., 574; 63 id., 326; 66 id., 413; 68 id., 167; 91 id., 553.

Order of General Term, affirming order appointing commissioners, affirmed.

Opinion by *Finch, J.* All concur.

## TAXATION.

### N. Y. COURT OF APPEALS.

The People ex rel. The Mutual Tel. Co., *applt.*, v. The Com'rs of Taxes, etc., of N. Y., *respts.*

Decided June 2, 1885.

The failure of a telegraph company to make the report required by § 8 of Chap. 471, Laws of 1858, does not deprive the tax commissioners of jurisdiction to assess its property, but in so doing they may proceed upon such information as they may have.

Ch. 269, Laws of 1880, giving a remedy by *certiorari*, does not permit a party complaining to lie by without availing himself of the opportunity to remedy his grievance by application to the commissioners.

This was a proceeding to review the decision of the Commissioners of Taxes and Assessments of the City of New York in relation to a tax upon the property of the relator. The relator was a telegraph company incorporated under Chapter 471 of the Laws of 1853. By § 3 of said act a telegraph company whose line is partly within and partly beyond the limits of the state is required to render "to the proper officer a true report of the cost to such company of their

works within the state." The relator omitted to make a report as required by this section between September 1, 1880, and May 1, 1881. Meanwhile the deputy tax commissioner ascertained from the relator's certificate of incorporation that its capital stock was \$600,000, and inserted this sum in the assessment list as the valuation of its property for the purpose of taxation. The Board of Tax Commissioners entered this sum in the "annual record" and gave the notice that the books were open for examination and correction as required. The relator did not appear or make any objection to the assessment during the time limited, or until after the right of the tax commissioners to correct the assessment had expired.

*Fisher A. Baker*, for applt.

*D. J. Dean*, for respts.

*Held*, That the relator's failure to make the report required by the act of 1853 did not deprive the tax commissioners of jurisdiction to assess its property and, in fixing the amount of the assessment, they were authorized to proceed upon such information as they might have. The assessment cannot be avoided for want of jurisdiction.

Chap. 269, Laws of 1880, gives a remedy by *certiorari* to review and correct an illegal, excessive or unequal assessment, but does not permit a party complaining to lie by without availing himself of the opportunity to remedy his grievance by application to the tax commissioners under the act of 1859, (Chap. 302), and after the assessment had been confirmed by lapse of time.

Order of General Term, affirming order of Special Term sustaining assessment, affirmed.

Opinion by *Andrews, J.* All concur.

## INDIANS.

### N. Y. COURT OF APPEALS.

That portion of the Cayuga Indians residing in Canada, *appls.*, v. The State, *respt.*

Decided June 2, 1885.

The treaties of 1789 and 1795 made by the state with the Cayuga Nation were public transactions, and in case of a violation by either party the other contracting party alone can demand satisfaction. Neither a citizen of the state nor any portion of the members of the Indian Nation, unless recognized by the state as the Nation, can complain.

This proceeding was instituted before the Board of Audit in February, 1883, and afterwards, by statute, transferred to the Board of Claims. The appellants claim to recover, first, \$448,000, as their share of all the annuities promised by the state to the "Cayuga Nation of Indians" by the treaties of 1789 and 1795 falling due since 1810, or 2d, for a share of those accruing since June 1st, 1849, or failing that, 3d, for a share of the annuities accruing since June 1, 1877, or that being denied, 4th, for a share of the annuity becoming due June 1, 1883, and thereafter forever according to the stipulations of those treaties. The Board of Claims rejected the whole and each part of the claim, pointing out as an obstacle to recovery that the claimants have no personal or even associate character, assumed to rep-

resent no one and do not pretend that they are authorized by statute to sue. The cause of action is a treaty stipulation between the "State of New York" and the "Cayuga Nation of Indians." Its purpose was the acquisition of the Indian title to lands within this State by the payment of a certain sum of money annually to that nation.

*James C. Strong*, for applts.

*D. O'Brien*, Atty. Genl., for resp't.

*Held*, That the claim was properly rejected; that the treaties in question were public transactions and in no sense private, and are obligatory on both parties; that if violated by either the other contracting party can alone demand satisfaction, and neither a citizen of the state nor a member of the Indian Nation, nor any portion of those members unless recognized by the state as the nation can complain. So long as the state recognizes the tribal organization existing and deals with it as a nation the courts and officers of the state must so regard it. Laws of 1876, Ch. 444, § 2.

Order of Board of Claims, dismissing claim, affirmed.

Opinion by *Danforth, J.* All concur, *Finch, J.*, in result.

#### LANDLORD AND TENANT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Henry Weil*, resp't., v. *Allen McDonald*, appl't.

Decided May 8, 1885.

Defendant was the general assignee for the

benefit of creditors of one M. and under the assignment took possession of the stock of goods owned by M. and entered upon the premises in which they were kept, which M. leased from plaintiff. Defendant notified plaintiff that he could not assume the lease of the premises and offered to pay \$50 a month as rent therefor, which plaintiff refused, asking \$100, and threatened to dispossess defendant unless he paid the latter sum, which defendant refused to do. Plaintiff did not dispossess defendant, however, and the latter remained upon the premises for two months while selling off the goods. In an action upon the lease to recover two months' rent, *Held*, that the defendant's occupancy was not as assignee under the lease but as merely a tenant by sufferance. That it seemed that the defendant was liable for rent at the rate of \$100 per month.

Appeal from judgment entered on the report of a referee.

One M., who rented the store in which he carried on his business from plaintiff, made a general assignment for the benefit of his creditors to defendant, who took possession of M.'s stock of goods under such assignment and entered into occupation of the store in which it was. On the day after accepting the assignment defendant went to plaintiff and notified him thereof and stated that he could not assume the lease of the store and asked what arrangement could be made concerning the rent while he was selling off the goods. Plaintiff stated that he would allow defendant to occupy the store for \$100 per month. Defendant refused to pay so much and offered \$50 per month, which plaintiff declined to receive and threatened to dispossess defendant unless \$100 per month rent was paid, to which defendant

replied that plaintiff could do as he pleased. Nothing further was done, however, and defendant remained in possession of the store for two months while he was selling off the stock. After defendant had surrendered possession, plaintiff brought this action against him on the lease to recover the rent reserved therein for the said two months.

*George Chalmers*, for applt.

*S. F. Freeman*, for respt.

*Held*, That defendant did not accept the assignment of the lease or assume payment of the rent reserved therein, but distinctly refused to do so, and attempted to make arrangements for the temporary use of the premises for a less sum.

That the finding and conclusion of the referee that defendant occupied the premises as assignee of the lease and became liable for the rent reserved therein were against the law and the evidence.

That defendant's occupancy was not as assignee under the lease but as merely a tenant by sufferance.

That it seemed, however, since defendant continued the use of the premises with knowledge that plaintiff demanded and required to be paid the sum of \$100 per month therefor, it would have been proper for the referee to have found that defendant was liable to pay at that rate during the time he remained in the store.

Judgment reversed and a new trial ordered.

Opinion by *Davis*, P.J.; *Daniels*, J., concurs.

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## EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Edward P. Stuart, trustee, *applt.*, v. Thomas J. Patterson et al., *respts.*

Decided June, 1885.

The reception of defendant's testimony in his own behalf, to the effect that a package of money which he sent by express in payment for the land in question was addressed to J., from whom plaintiff claims title to the land for the possession of which this action was brought, J. being dead, *held*, error.

Appeal from judgment on referee's report.

Action to recover possession of certain real estate.

*Edward Harris*, for applt.

*J. A. Stull*, for respts.

*Held*, That it was error to permit defendant to testify, as a witness in his own behalf, that the package of gold coin which he sent by express was addressed to John M. Stuart individually. Stuart was not living at the time of the trial, and from him plaintiff derived his title to the land and for the possession of which the action was brought. The direct tendency of the testimony was to show a paying or sending of money by defendant to Stuart. Otherwise, it was wholly immaterial and irrelevant. The testimony related to a "personal" communication or transaction, within § 829 of the Code. The superscription on the package was something more than a direction to the express company; it was a communication to the person addressed, advising him that the package and its contents were

intended for him. The vice of the ruling is that it permitted the witness to state a fact which, taken in connection with proof that the package reached its destination, raised the presumption that the money contained in it was paid by the witness to Stuart individually and not to the firm of which he was a member. So that, if Stuart had been living, it would have been competent for him, and he would have been required for his own protection, to testify to any fact within his knowledge that tended to repel such presumption, as, for instance, that the package was not delivered to him, or that it was addressed to the firm and not to himself. See 95 N. Y., 316, 325; 85 id., 639, 640; 30 Hun, 525.

The testimony thus improperly received touched a vital point in the controversy, and cannot be said not to have had its effect in the decision of the case.

Judgment reversed and new trial ordered before another referee, costs to abide event.

Opinion by *Smith, P.J.*; *Barker, J.*, concurs; *Bradley, J.*, dissents; *Haight, J.*, not sitting.

### NEGLIGENCE.

#### N. Y. COURT OF APPEALS.

*Hickey*, by guardian, *respt.*, v. *Taaffe*, *applt.*

Decided June 2, 1885.

Chap. 122, Laws of 1876, has no application to productive industries or useful or necessary business or occupation. A business or vocation to be within that act must be an employment either vicious in itself or

which partakes of the character of an amusement.

Reversing S. C., 19 W. Dig., 67.

This action was brought to recover damages for personal injuries to plaintiff, an infant under the age of 16 years. Plaintiff was employed by defendant in his steam laundry. The collar and cuff ironer at which she worked had four rollers, two of which were heated. There was no guard or protection in front of them. The machine was supplied with wheels, catches, bolts and other parts, but no shifter or lever with which to stop or start it. Its motion was in no way controlled by the operator, and if her hand was caught in it, it was necessarily crushed or burned. Plaintiff claimed that her hand was drawn between the rollers and crushed. The only question submitted to the jury was whether plaintiff's business or vocation was dangerous to life or limb. A verdict was rendered for plaintiff.

*Gerard B. Van Wart*, for *applt.*

*Patrick Keady*, for *respt.*

*Held*, Error; that the cause of action here could not be dealt with under the provisions of Chap. 122, Laws of 1876, An act "to prevent and punish wrongs to children."

A "business" or "vocation" to be within the purview of that act must be an employment either vicious in itself or one which partakes of the character of an amusement. Said act has no application to productive industries or useful or necessary business or occupation.

Cowley v. People, 83 N. Y., 464, distinguished and explained.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Danforth, J.* All concur.

## APPEAL. NEW TRIAL.

### N. Y. COURT OF APPEALS.

Thomas, exrx., *applt.*, v. The N. Y. Life Ins. Co., *respt.*

Decided June 2, 1885.

Whenever the character of the issues framed by the pleading is such that upon a new trial it would be possible for the defeated party to recover, upon a reversal the appellate court should award a new trial.

In an action for conversion of personal property the answer set up a purchase from the executrix prior to the issue of letters testamentary and payment therefor. The trial court found these facts and rendered judgment for the value of the property. The General Term reversed this judgment and gave judgment for nominal damages. *Held*, Error; that it should have ordered a new trial.

Reversing S. C., 19 W. Dig., 885.

This action was brought for the conversion of certain articles of furniture belonging to T., plaintiff's testator, and claimed by plaintiff as his executrix. The complaint alleged her title, a demand and refusal; that the property was worth \$5,000, and claimed judgment for that amount. The answer denied the conversion and the valuation put upon the property, and pleaded as an affirmative defense a purchase of the furniture from the plaintiff, after the

death of the husband and before the issue of letters testamentary, for \$400 paid to her in cash. The trial court found as facts, the ownership of the property by the testator and that its value was \$400, his death, the issue of letters testamentary to plaintiff in July, 1879, the taking of the property by defendant in February, 1879, and six days later the execution by plaintiff of a bill of sale and release of the furniture to defendant for the consideration paid of \$400, and the discharge and cancellation of an alleged debt due from her husband of \$5,250, and that when this contract was made the purchaser knew that the seller had not yet received letters testamentary or qualified as executrix. A judgment for \$400 was rendered in favor of plaintiff, which the General Term reversed, giving judgment for nominal damages only.

*W. Bourke Cockran*, for *applt.*

*Wm. B. Hornblower*, for *respt.*

*Held*, Error; that the General Term should not have rendered a final judgment, but should have ordered a new trial. 75 N. Y., 374.

Whenever the character of the issues framed by the pleading is such that upon a new trial it would be possible for the defeated party to recover, a new trial must be awarded.

Judgment of General Term, reversing judgment for plaintiff and awarding nominal damages, reversed as to nominal damages and new trial ordered.

Opinion by *Finch, J.* All concur.

## MUNICIPAL CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Bridget Grier, *respt.*, v. The City of Lockport, *applt.*

Decided June, 1885.

Defendant's charter requires that all claims against the city shall be presented to the common council, and that no action thereon shall be brought until 40 days after it shall have been so presented. *Held*, That a claim once rejected by the council need not be presented to the treasurer, either to entitle plaintiff to costs in a suit on said claim, or to notify defendant of the claim.

Appeal from order of Special Term, directing taxation of costs in plaintiff's favor.

*W. C. Greene*, for *applt.*

*W. H. Ransom*, for *respt.*

*Held*, In addition to Mr. Justice Corlett's views at Special Term, consideration is due to the fact that defendant's charter requires that all claims against the city shall be presented to the common council for audit, and that no action to recover any such claim shall be brought against the city until the expiration of forty days after it shall have been so presented. Laws of 1873, Ch. 387, § 2. The claim in suit was so presented and was rejected by the common council. No further presentation of the claim to the treasurer was requisite to entitle plaintiff to costs. Such presentation would have been nugatory, as that officer had no authority to pay a claim which the common council had rejected. *Id.*, § 6. Nor was such presentation necessary by way of notifying defendant of the claim, as notice had

already been given to the common council.

*Baine v. The City of Rochester*, 85 N. Y., 523, and *Dressel v. The City of Kingston*, 32 Hun, 526, distinguished.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Smith, P. J.*; *Barker, Haight* and *Bradley, JJ.*, concur.

## ARREST.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edward D. Sniffen, *respt.*, v. Charles R. Parker, *applt.*

Decided May 8, 1885.

While it is the rule that where the ground upon which defendant is arrested is identical with the cause of action and must be established to enable plaintiff to recover upon the trial the order of arrest will not be set aside upon motion on conflicting affidavits unless the evidence is of such a character as would require the justice presiding at the trial to direct a verdict for defendant, still when a motion to vacate the order of arrest is made upon affidavits in such a case the administration of justice requires an examination pro and con, for the purpose of ascertaining whether the order was providently or improvidently granted.

Appeal from order denying motion to vacate an order of arrest.

The order of arrest was granted on the ground that defendant was guilty of a fraud in contracting or incurring the liability of which the action was predicate. A motion to vacate it was made upon affidavits, and it was denied by the justice hearing it, for the reason that as the cause of arrest and cause of action were the same, the matter should be left to the jury.



*Wesley S. Yard*, for applt.

*Morris A. Tyng*, for respt.

*Held*, That while it is the rule that where the ground upon which defendant is arrested is identical with the cause of action and must be established to enable plaintiff to recover upon the trial the order of arrest will not be set aside upon motion on conflicting affidavits, unless the evidence is of such a character as would require the justice presiding at the trial to direct a verdict for defendant; still, when a motion to vacate the order of arrest is made upon affidavits in such a case, the administration of justice requires an examination pro and con, for the purpose of ascertaining whether the order was providently or improvidently granted. 7 Hun, 195.

That the case was not disposed of on its merits in the court below, and considering it upon its merits the order of arrest should have been vacated.

Order reversed.

Opinion by *Brady, J.*; *Davis, P.J.*, concurs; *Daniels, J.*, concurs in the result.

#### PROMISSORY NOTES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Frances C. Blackman*, applt., v. *Dwight M. Cavin*, exr., respt.

An instrument in writing by which the maker promises to pay a specified sum at his death is a promissory note, although it is payable to a named payee, and therefore not negotiable.

Appeal from a judgment in favor of defendant entered upon a verdict.

The complaint set forth an instrument in writing executed by defendant's testator, who was plaintiff's father; alleged that he delivered the instrument to plaintiff; his death and the appointment of defendant as executor.

The instrument was as follows:

"\$888. On the 21st day of December, for value received, I promise to pay to *Frances C. Blackman*, eight hundred and eighty-eight dollars, with interest, at my death.

Dated December 21, 1881.

ABEL CAVIN."

The answer, after admitting probate of the will, the qualification of defendant, and that a claim for payment had been made and rejected, and an offer made to refer, consisted of denials.

In the course of the charge the court said in respect to the instrument, "It is an agreement which has been called, during the trial, a promissory note, although in legal effect it is not a promissory note." Plaintiff excepted to that part "where the court charged that this is not a promissory note."

*E. D. Wagner* and *O. W. Smith*, for applt.

*W. W. Johnson*, for respt.

*Held*, That that portion of the charge was erroneous. The words "on the 21st of December" in the body of the instrument must be regarded as repugnant or surplusage, and not having any force in ascertaining the time for payment of the instrument. 3 Hill, 132. We are thus brought to see and say that the instrument was payable and matured at the death of the

maker by its terms. As his death must inevitably happen some time or other, it falls under the definition of a promissory note. Its payment did not depend upon an uncertain event; death is certain. Edwards on Bills, 2d ed., m. p., 142; Chitty on Bills, m. p., 136. Though this note was payable to a named payee, and therefore non-negotiable, it was still a promissory note according to our statute and the authorities. 3 R. S., 7th ed., 2242; 14 Hun, 193; 2 Cow., 536; 10 Wend., 675; 13 How., U. S., 228; 6 T. R., 123; 2 Ld. Raym., 1545; 3 Caines, 137.

Plaintiff requested the court to charge "that the note in suit expresses sufficient consideration on its face to entitle plaintiff to recover, and that the burden of proof is on defendant to contradict the statement in the note that it was given for value received." This request was refused, the court adding that "where defendant has given any evidence bearing upon the question of there being no consideration, that the burden of proof still remains with plaintiff to establish by a fair preponderance of evidence that the note was given upon a good and sufficient consideration."

*Held*, That plaintiff was entitled to the charge requested. The instrument set out in the complaint purports to be for value received; that was sufficient allegation of consideration. 10 Hun., 591; 15 N. Y., 426; Code Civ. Pro., § 534. When the note was read upon the trial its terms were evidence of a consideration and sufficiently es-

tablished the fact of a consideration to support the promise to pay. See 46 Barb., 354.

We cannot say that the error in respect to the instrument did not have any effect upon the jury upon the sharp question of fact arising in the case, as to whether the signature of defendant's testator was genuine or forged.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P.J.*; *Boardman, J.*, concurs; *Follett, J.*, not sitting.

## CONTRACT.

### N. Y. COURT OF APPEALS.

Pond, assignee, *respt.*, v. Starkweather, impl'd, *applt.*

Decided June 23, 1885.

One who, as a member of a firm, has contracted with another for the performance of a certain thing may as an individual make a valid promise concerning the same matter.

In an action upon a promise to pay for goods it appeared that on a negotiation of a sale of the goods to defendant's firm one of his partners objected to some of the terms of the offer, whereupon defendant agreed orally that if the vendor would comply with his partner's wishes defendant would pay according to the objectionable terms. *Held*, that this was not a promise by the firm, but was a distinct contract binding on the promisor.

Affirming S. C., 20 W. Dig., 265.

The complaint in this action alleges that defendants promised to pay to B., plaintiff's assignor, the value of a certain lot of seeds, on condition that he would transfer and deliver them to H. S. & Co., performance by him and a breach on the part of defendants. B. was

called by plaintiff as a witness and testified that on one occasion when he was negotiating with H. S. & Co. for the sale of a large quantity of seeds and other property to them for \$30,000 a member of the firm insisted that the seeds referred to in the complaint should be included, and that on B. refusing, these defendants, being the other two members of H. S. & Co., consulted privately and told him that if he would allow said seeds to go in under that \$30,000 they would pay for them at the same rate which the other seeds were to go in at under the contract, and he, relying upon that agreement only, included them in the bill of sale to H. S. & Co., and they took possession of them; that they were worth at the prices mentioned in the contract \$4 or \$5 a box and had not been paid for. Defendant's counsel moved for a nonsuit on the ground that the alleged cause of action was not proved. The motion was denied.

*H. H. Woodward*, for applt.

*John Van Voorhis*, for respt.

*Held*, No error; that the promise relied upon is not the promise of the firm. One who as a member of a firm has contracted with another for the performance of a certain thing, may as an individual make a valid promise concerning the same matter. His capacity as a person is not merged in the partnership.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

## INJUNCTION. SANITARY LAWS.

N. Y. COURT OF APPEALS.

The Health Dept. of N. Y., *applt.*,  
v. Purdon et. al., *respts.*

Decided June 2, 1885.

An injunction will not lie under the State sanitary laws to restrain the sale of imports of teas in original packages, though such teas be adulterated, unless it is shown that such injunction is imperatively necessary to prevent serious danger to human life or serious detriment to health.

Affirming S. C., 20 W. Dig., 352.

This action was brought to restrain the sale of certain teas, on the ground that they were adulterated and unfit and unwholesome for food, and an injunction was asked for.

Plaintiff sought to make out its case by the introduction of expert evidence alone and to the effect that the use of the teas in question as a beverage was in the opinions of the witnesses deleterious and unwholesome. These opinions were based wholly upon theoretical knowledge of the nature and character of the substances used in adulteration and their supposed effect upon the human system when used in connection with the teas as a beverage. Most of plaintiff's witnesses testified that they had never known or heard of a case where the use of teas like those in question had proved injurious. The evidence on the part of defendants tended strongly to show not only that all green teas were similarly adulterated, but that their use as a beverage was not thereby rendered unwholesome. Several

dealers of long experience in buying and selling teas testified that they had never heard of a case where the use of such teas had proved injurious. One of the defendants swore that he had drank steadily and daily for a number of months the teas in question and had discovered no injurious effects therefrom. An expert of established character for scientific attainments and learning testified that he drank of the teas in question and found them very palatable and followed by no ill effects, and that he had carefully examined and analyzed samples of the teas and in his opinion there was nothing injurious or unwholesome in their use.

The trial court found that the teas in question were adulterated and colored to some extent with offensive and obnoxious drugs and substances, but concluded that insufficient evidence had been produced to prove that the use of said teas was dangerous to human life, or detrimental to health and unwholesome, or that the injunction prayed for is needed to prevent serious danger to human life or detriment to health, or that the said teas or the selling or offering for sale of the same is a nuisance.

*W. P. Prentice*, for applt.

*George H. Forster*, for respts.

*Held*, No error; that the evidence raised a question of fact, upon which the court below might well conclude that the sale and use of the teas would not produce irreparable mischief, or the necessity for the interposition of the court by way of injunction.

The fact that the teas in question were adulterated, and that their possession for sale to the general public was a nuisance, subjecting the offenders to an indictment, and in case of sale to actions for penalties for selling adulterated goods alone is insufficient to support this action. 3 Stock., 204; 2 Johns. Ch., 371. The court will inquire not alone as to the unlawfulness and offensiveness of the act complained of, but also as to its extent, the circumstances surrounding its exercise, and the degree of danger to be apprehended from its continuance. 38 Me., 424; Story's Eq. Jur., §§ 924, 925.

To entitle a plaintiff to equitable relief by injunction restraining a nuisance he must prove a case of strong and pure injustice, of pressing necessity or imminent danger, of great and irreparable damage, and not of that nature for which an action at law would furnish an adequate remedy. 17 N. H., 78; 3 M. & K., 179.

The language used in the consolidating act giving courts jurisdiction to interfere by injunction to restrain nuisances in the City of New York has not changed the established rule as to imminency of the danger to be apprehended or the necessity of such a remedy to avoid irreparable injury. By that act it must appear that the injunction is needed, among other things, to prevent "serious danger to human life or serious detriment to health," and unless the facts of the case bring it within the requirement that it is imperatively necessary to prevent the conse-

quences described, the plaintiffs have failed to show such a case as entitles them as matter of right to the remedy demanded.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Ruger, Ch.J.* All concur.

## STATUTES. TERM OF OFFICE.

### N. Y. COURT OF APPEALS.

The People *ex rel.* Mason, *applt.*,  
v. McClave, *respt.*

Decided April 14, 1885.

The word "term" as used in § 25 of Chap. 335, Laws of 1873, is intended to designate consecutive periods of six years following each other in regular order. The term of office of one appointed during such period expires with the expiration of that period.

This was a controversy in relation to the office of Police Commissioner of the City of New York. The relator claimed under an appointment made by the mayor and confirmed by the board of aldermen May 25, 1880. Defendant claimed under a similar appointment and confirmation made November 24, 1884. The relator's certificate of appointment states that he was appointed in the place of W., whose term of office expired May 1, 1878, under Chap. 335 of the Laws of 1873. The New York charter of 1873 (Chap. 335, § 25), fixing the terms of heads of departments and commissioners, provides: "Every head of department and person in this section named, except as herein otherwise provided, shall hold his office for the

term of six years, and in each case until a person is appointed in his place."

*Francis Lynde Stetson* and *Charles P. Miller*, for *applt.*

*Joseph H. Choate* and *Edward M. Shepard*, for *respt.*

*Held*, That the term of the relator expired April 30, 1884; that the word "term," as used in said 25th section of the charter of 1873, should be construed as designating consecutive periods of six years, following each other in regular order, the one commencing when the other ends, and treating the incumbent appointed in any such period as the incumbent of the peculiar term or period of six years to which his appointment relates, whose office would expire with the expiration of the six years' term or period. Every new term of office for the purpose of computation is deemed to have commenced on the first day of May of the year of which the preceding term expired.

The Consolidation Act of 1882, which was enacted "to declare the special and local laws affecting public interest in the City of New York," provides (§ 106) "The terms of office of all such heads of departments and persons whensoever actually appointed shall commence on the first day of May in the year in which the terms of office of their predecessors expire."

*Held*, That this act is entitled to force as a legislative construction of the act of 1873.

Judgment of General Term, for defendant, on case submitted, affirmed.

Opinion by *Andrews, J.* All concur.

### TAXATION. N. Y. CITY.

#### N. Y. COURT OF APPEALS.

*Haight, applt., v. The Mayor, etc., of N. Y., respt.*

Decided June 9, 1885.

In the City of New York it is not essential to the validity of a tax upon land that the name of the owner should be inserted in the assessment list.

The only effect of an omission of, or an error as to, the name of the owner is to deprive the city of its right to collect the tax from the owner's personal property and confine its remedy to the enforcement of the lien on the lands.

Affirming S. C., 19 W. Dig., 54.

This action was brought to have certain taxes upon real estate in the City of New York declared void. Opposite the description of the premises in the assessment roll are the words "Est. R. K. Haight." Plaintiff claims that the tax was void because the name given was not that of an owner or occupant.

*J. Alfred Davenport, for applt.*

*D. J. Dean, for respt.*

*Held, Untenable.* In the City of New York it is not essential to the validity of a tax upon land that the name of the owner should be inserted in the assessment list. The tax may be assessed directly upon the land, properly describing it, and the only effect of omitting to insert the name of the owner, or of inserting the name of one who is not the owner, is to deprive the city of the right to collect the tax from the owner personally, or by distress of goods, chattels, etc., and to confine its remedy for the

collection of the tax to its enforcement of the lien therefor upon the land assessed. Laws of 1867, Ch. 410.

Judgment of General Term, reversing judgment for plaintiff, affirmed.

Opinion by *Rapallo, J.* All concur.

### STATUTES. TERM OF OFFICE.

#### N. Y. COURT OF APPEALS.

*The People ex rel. Wood, applt., v. Lacombe, respt.*

Decided April 14, 1885.

It was the intention of the legislature that the sole power of appointment conferred upon the mayor of New York by Chap. 48 of the Laws of 1884, should be exercised only by a mayor subsequently elected.

The interpretation of statutes is to be controlled by the intention of the legislature, which is to be ascertained from the cause or necessity of the enactment as well as other circumstances. A case which is within such intention is within the statute, although by a technical interpretation not within its letter.

Affirming S. C., 20 W. Dig., 378.

This was a controversy involving the title to the office of Corporation Counsel of the City of New York. Defendant held the office by virtue of an appointment made by Mayor Edson May 31, 1884, to fill a vacancy. He was confirmed by the board of aldermen. His term of office expired December 10, 1884, but he held over under the statute, which provides that he should continue to discharge the duties of his office until his successor was appointed and had qualified. On January 1, 1885, the relator was appointed Corporation Counsel by

one Kirk, who claimed to be president of the board of aldermen, and as such assumed to act as mayor between the hours of twelve o'clock midnight, Dec. 31, 1884, and twelve o'clock noon of January 1, 1885. On January 14, 1885, Mayor Grace, the then mayor, reappointed defendant to the office he then claimed to fill. Section 31 of the Consolidation Act of 1882 provides (Chap. 410) that the mayor's term of office shall commence at noon on the first of January next after his election. Chapter 43, Laws of 1884, "An act to centre responsibility in the administration of the government in the City of New York," provides (§ 1) "All appointments to offices in the City of New York now made by the mayor and confirmed by the board of aldermen shall hereafter be made by the mayor without such confirmation." It was provided that this act should take effect January 1, 1885. The election at which a mayor would be elected, who in accordance with the provisions of the Consolidation Act of 1872 (§ 31), would take office at twelve o'clock noon on January 1, 1885, occurred in November, 1884.

*David Dudley Field, Robert Sewell, Aaron J. Vanderpoel, George Bliss and George H. Forster, for applt.*

*James C. Carter, Charles F. Southmayd and Thomas Allison, for respnt.*

*Held,* That the appointment of the relator was invalid and defendant was entitled to the office, having been appointed by the proper authority.

By Chap. 43, Laws of 1884, the legislature intended to confer the power of appointment upon the mayor to be elected in November, 1884, and not upon the mayor who was in office at the time said act was passed. Said act must be interpreted in connection with the provision of the Consolidation Act of 1882 defining the commencement of the term of office of the mayor to be elected in November, 1884, until noon on the first day of January, 1885, and as taking effect at that time.

The interpretation of statutes is to be controlled by the intention of the legislature in passing them, which is to be ascertained from the cause or necessity of the enactment as well as other circumstances. Where the case is brought within the intention of the makers it is within the statute, although by a technical interpretation not within its letter. It is the spirit, object and purpose of the statute which are to be regarded in its interpretation, and if they are fairly expressed in it the statute should be so construed as to carry out the legislative intent, although such construction is contrary to the literal meaning of some of its provisions. Where there is a doubt or uncertainty in regard to the intention of the legislature a reasonable construction should be adopted. 95 N. Y., 558; 10 id., 389; 21 id., 461; 13 id., 78; 22 Wend., 397; 6 Hill, 619; 3 Bing., 193; 24 Pick., 370; 68 N. Y., 479. The above rules may be properly invoked where several statutes are passed relating to the same general subject.

Judgment of General Term, for defendant on case submitted, affirmed.

Opinion by *Miller, J.* All concur.

### CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John McClave et al., *respts.*, v. John B. Thompson et al., *appls.*

Decided May 8, 1885.

A judgment against a business corporation founded upon advances made to it by one of its directors cannot be included in estimating the indebtedness of such corporation for the purpose of sustaining an action to enforce the liability of the trustees of such corporation, imposed by § 22 of Chap. 611 of the Laws of 1875, for creating an indebtedness in excess of the capital stock of the corporation.

Bonds of the corporation not shown in the complaint to have been issued or to have reached the hands of creditors cannot be included in estimating such indebtedness. All the directors of the corporation liable under § 22 of Chap. 611 of the Laws of 1875, *supra*, must be joined in an action to enforce the liability so imposed.

Appeal from an interlocutory decree overruling a demurrer to the complaint.

The plaintiffs, as creditors of the Rockaway Beach Improvement Co. (limited), brought this action against defendants, who were its directors, to enforce a personal liability claimed to have been incurred by them under § 22 of Chap. 611 of the Laws of 1875, which provides that "if the indebtedness of any such corporation shall at any time exceed the amount of its capital stock, the directors of such corporation creating such indebt-

edness shall be personally and individually liable for such excess to the creditors of the corporation."

Among the items of indebtedness enumerated as making up the amount of indebtedness exceeding the capital stock of the corporation were "Seven hundred bonds of said company, each of the denomination of \$1,000, with interest from the first day of April, 1880, all of the principal and interest on such bonds from the first day of April, 1880, being unpaid;" and "a certain judgment against the corporation for the sum of \$325,926.01, the consideration whereof was advances made by defendant Smith to the corporation."

Defendants Thompson and Smith demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, for the reason that the two items of indebtedness above mentioned should not be included in estimating the indebtedness of the corporation for the purposes of this action, and that, deducting the said two items, the indebtedness of the corporation did not exceed the amount of its capital stock; and also upon the ground that there was a misjoinder of parties defendant, for the reason that the statute held each director to an undivided liability, *in solido*, for the excess of the debts created by him, and that a joint action against them could not be maintained.

*Lewis Sanders*, for applt.

*James W. Perry*, for resp't.

*Held*, That the bonds of \$700,000 must be deducted from the indebt-



edness, for the reason that the complaint failed to show that these bonds, or either of them, had been issued by the corporation, or had reached the hands of creditors, and that, for all that appeared, they might still be in the treasury of the company unissued. 66 How. Pr., 123.

That the other item mentioned should also be deducted, for a judgment founded upon advances made by a director of the corporation cannot be included in estimating the indebtedness of the corporation for the purpose of sustaining an action like the present. 65 N. Y., 255; 80 id., 610.

That there was no misjoinder of defendants; that all the directors liable under § 22 of Chap. 611, of the Laws of 1875, must be joined in an action to enforce the liability created thereby. 93 N. Y., 228, 232; 21 Hun, 568.

Judgment reversed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

#### RAILROADS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Joseph H. Bushby v. The N. Y., L. E. & W. RR. Co.

Decided June, 1885.

Plaintiff was an employe of defendant and was injured through the breaking of a wooden stake used to keep in place a car-load of lumber in course of transportation. *Held*, under the circumstances stated below, that plaintiff made out a case for the jury.

Motion by plaintiff for new trial on exceptions taken at circuit and ordered heard at General Term in first instance.

Plaintiff, while in defendant's employ as brakeman, was injured by the breaking of a wooden stake upon a platform car loaded with lumber, which was being carried on defendant's road. The stake was one of several that were put in iron pockets at the sides of the car to keep the lumber in place, and by its breaking part of the lumber fell to the ground while the train was in motion, and plaintiff was thrown off with it, and thus was injured. There was evidence tending to show that the stake appeared after it broke to be dozy, brittle and partially decayed and unfit for the use to which it was put. The stakes were uniformly furnished by the shipper of the lumber. There was much testimony tending to show that the stake was apparently sound, and that there was no defect about it which could be discovered by a reasonably careful inspection. But one witness testified that the *outside* of the stake was "spongy and like a cork where it had been shaved off with an axe." It does not appear that it was plaintiff's duty to inspect the car to see whether it was properly loaded. He testified that in passing the car he glanced at it, but discovered no defect in the stake.

*A. Hadden*, for plff.

*E. C. Sprague*, for deft.

*Held*, That defendant's duty in providing the stakes was within the rule that the duty of the master to the servant, and the implied contract between them, are to the effect that the master shall furnish proper, perfect, and adequate ma-

chinery, or other materials and appliances necessary for the proposed work; and that duty or contract is to be affirmatively and positively fulfilled and performed. 49 N. Y., 521; 59 id., 517.

Defendant could not divest itself of its duty to inspect the stakes by leaving that duty to be performed by the shipper, or by making an agreement with him whereby he undertook to perform it.

There was enough testimony at least to raise a question for the jury as to whether a reasonably careful inspection would have disclosed the defect.

If the agents whom defendant employed to inspect the stakes furnished by the shipper failed in their duty, their negligence cannot be treated as that of plaintiff's co-employees. Such agents acted in place of the employer. 85 N. Y., 70; 49 id., 521; 53 id., 549.

The risk of danger and injury incurred by plaintiff cannot be considered as incident to his employment and assumed by him. Nor can it be said, as matter of law, that plaintiff was chargeable with negligence in not discovering the defect before he went upon the train.

Plaintiff made a case for the jury, and there should be a new trial.

Opinion by *Smith, P.J.*; *Barker* and *Bradley, JJ.*, concur; *Haight, J.*, not voting.

#### EXTRA ALLOWANCE.

N. Y. COURT OF APPEALS.

Mingay et al., *respts.*, v. The Holly M'fg. Co. impl'd., *applt.*

Decided June 9, 1885.

The water commissioners of a village made a contract with defendants for certain machinery to be paid for by the village on their acceptance of it, the title to remain in defendant until full payment. This has not been made. Plaintiffs, as taxpayers, by this action sought to restrain the performance of the contract as *ultra vires*, but were defeated. *Held*, that a pecuniary right was directly involved in the action, the value of which was the basis for an extra allowance under § 1353 of the Code.

Reversing S. C., 20 W. Dig., 518.

This action was brought by plaintiffs, who are taxpayers of the village of Saratoga Springs, against the water commissioners of that village, the village corporation and the Holly M'fg. Co., for the purpose of having a contract between said water commissioners and said manufacturing company set aside and declared null and void, and restraining the water commissioners from carrying out the contract, and of recovering for the benefit of the village any money that had been paid under the contract to said manufacturing company. The complaint alleged that the contract was made in violation of the village charter, and that the company had not performed it in certain respects, and was fraudulently colluding with the water commissioners to have the latter accept the work. A judgment was rendered in favor of the manufacturing company. An extra allowance of \$340 was made to said company. The order granting it was reversed by the General Term on the ground that the value of the contract to the Holly company, that is the profits it would have made if the contract had been per-

formed on both sides, or in other words, the difference between the contract price and the value of the labor and machinery due and furnished by the company, under the contract, was the only basis for an extra allowance, and as no proof was given upon this point no allowance could be made.

*Esek Cowen*, for applt.

*Matthew Hale*, for respts.

*Held*, Error; that a pecuniary right was directly involved in the action, the value of which was the basis for an extra allowance under § 1353 of the Code. It is immaterial that the form of the action and the relief sought would not authorize another judgment in favor of either party. 63 N. Y., 176; 45 id., 499; 92 id., 491.

Order of General Term, reversing order of Special Term granting extra allowance, reversed; but as the court below disposed of the case on a question of law, without passing on the correctness of the allowance on the merits, the case should be remitted to the General Term for further consideration.

Opinion by *Andrews, J.* All concur.

## FIRE INSURANCE.

### N. Y. COURT OF APPEALS.

*Cole*, assignee, *applt.*, v. *The Germania Fire Insurance Co.*, *respt.*

Decided April 14, 1885.

A policy was issued upon a brick building used for planing and wood-working, which provided that it should be void in case of increase of risk by the erection of neighboring buildings. Thereafter a wooden building was erected six or seven

feet distant to be used as a drying house. Evidence was given tending to show that the close proximity of such a building to a brick building ordinarily increases the hazard of the latter. *Held*, That the court was justified in assuming that there was an increase of risk.

The knowledge of the agent of the assured as to an increase of risk at the time of applying for a renewal is imputable to his principal, and his failure to disclose it has the same effect as if the principal had personally failed to do so.

This action was brought upon an alleged renewal agreement of fire insurance by plaintiff, the assignee of *H.* The original policy was issued to *D. & Co.* upon their brick building occupied for planing and wood-working purposes, for one year from January 19, 1881, loss, if any, payable to *H.*, mortgagee. It contained a special clause known as the mortgagee's clause. Among the conditions was one making the policy void in case of "increase of hazard" by the erection of neighboring buildings. During the life of the original policy *D. & Co.* erected on the premises, six or seven feet from the main building, a house constructed of wood, one story high, intended for the drying of lumber, in which they placed a large amount of lumber, using therein steam introduced by pipes connected with the boiler in the main building. An insurance broker, who acted as agent for *D. & Co.* and for *H.* in procuring the original policy and in making the alleged renewal agreement, testified that a frame building is more hazardous than one of brick, and the close proximity of a frame building to a brick building ordinarily in-

creases the hazard of the latter.

*Edward M. Shepard*, for applt.

*Osborn E. Bright*, for respt.

*Held*, That the court was fully justified in assuming that there had been an increase in risk.

A fire occurred in the premises after the expiration of the original policy. It was claimed by plaintiff that the policy had been renewed. It contained a clause which provided that it could "be renewed by the payment of premium for extended term, duly receipted for, but in case there shall have been any increase of hazard it must be made known to the company by the assured at the time of renewal, otherwise this policy shall be void." The mortgage clause also provides that the mortgagee shall notify the company of any increase of hazard which shall come to his knowledge, and if not permitted by the policy, shall pay therefor according to the established rates. The increase of hazard by the erection of the drying house was known to plaintiff's agent when the alleged renewal agreement was made.

*Held*, That the knowledge of plaintiff's agent was imputable to his principal, and his failure to disclose the increase of hazard put the principal in the same position as if with actual knowledge of it he had personally applied for the renewal and omitted to inform the defendant. 10 Jur., N. S., 851; Story on Agency (9th ed.), §§ 129, 140. The increase of hazard was a fact material to the risk, and a condition precedent to the continuance of defendant's liability.

The mortgage clause provided that the interest of a mortgagee shall not be invalidated by any act or neglect of the mortgagor, or the owner of the property insured.

*Held*, That this does not protect the mortgagee's interest in this case, as it was his own act or default which brought the case within the clause avoiding the policy. 87 N. Y., 69.

The only evidence as to the renewal was the testimony of the mortgagee's agent. He swore that he went to the company's office and asked for a renewal, and that the agent consented to renew the policy. He purports in his testimony to narrate the whole transaction. No reference is made to any notice having been given of the increased risk. At the conclusion of the testimony defendant moved to dismiss the complaint, on the ground, among others, of the increased risk. The motion was granted. Plaintiff's counsel excepted merely to the order dismissing the complaint.

*Held*, No error; that under the circumstances it is not open to plaintiff to raise for the first time on appeal the point that a non-disclosure was not shown; that the evidence tended to show that the increase of hazard was not disclosed, and that plaintiff acquiesced in the assumption of this fact by the court on the final disposition of the case.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Andrews, J.* All concur.

## RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Farmers' Loan & Trust Co., *applt.*, and Francis H. Campbell et al., *respts.*, v. The Southern Telegraph Co., *respt.*

Decided May 8, 1885.

As between the State and Federal Courts, the court which first acquires jurisdiction of the subject matter of an action to foreclose a mortgage, and which is first put in motion, will retain its control to the end of the controversy, and the possession by its receiver will not be disturbed by the subsequent appointment of a receiver by the other court, except under very extraordinary circumstances.

When an action to foreclose a mortgage upon the property of a telegraph company commenced by the trustee of the bondholders in the courts of this state is about to be discontinued by the plaintiff for the reason that another action for the same purpose has been previously commenced in the courts of the United States in which a receiver of the defendant's property has been appointed, a bondholder of the defendant will not be made a party plaintiff, upon his application, in order that he may continue the action.

Appeal from an order allowing Francis H. Campbell and Cassius H. Read to come in and be made parties plaintiff in this action.

This action was brought by the Trust Co. as trustee for the bondholders of the defendant to foreclose a mortgage upon defendant's property. Upon proof that the Trust Co. was about to discontinue the action, Messrs. Campbell and Read, who were bondholders of defendant, were permitted by the order appealed from to come in and be made parties plaintiff for the purpose of continuing the action and retaining the property of

defendant in the hands of the receivers which had been appointed therein.

In opposition to this application it was made to appear that the reason why the Trust Co. intended to discontinue the action was that, previous to the commencement of this action, another for the same purpose had been commenced by a bondholder of defendant in the United States Circuit Court for the Eastern District of Virginia, and that a receiver of defendant's property had been appointed therein, and that the Trust Co. had been ordered by that court to discontinue this action.

*Turner, Lee & McClure*, for *applt.*

*John S. Smith*, for Campbell and Read, *respts.*

*Held*, That the continuance of the proceedings in this case would not only be a violation of an order made by a court of competent jurisdiction acquired prior to the commencement of this action, but would result in an unfortunate and unseemly litigation which could not fail to be to the disadvantage of defendant, its bondholders and creditors.

That it is a very well settled principle of both the State and Federal Courts, that the court, whether State or Federal, which first acquires jurisdiction of the subject matter of the action and which is first put in motion will retain its control to the end of the controversy, and the possession by its receiver will not be disturbed by the subsequent appointment of a receiver by the

other court except under very extraordinary circumstances, which do not exist in this case.

High on Receivers, § 50; 6 Bissell, 197; 2 id., 390; 20 Wis., 165.

Order reversed.

Opinion by *Brady, J.; Davis, P. J., and Daniels, J.*, concur.

### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Peter Moller, Jr., et al., ex'rs., *respts.*, v., Joseph W. Duryee et al., exrs., *appls.*

Decided May 8, 1885.

A mortgage upon a leasehold estate which, by its terms, covers "the edifices, buildings, rights, members, privileges, and appurtenances thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity of the mortgagor, of, in, and to the demised premises and every part and parcel thereof with the appurtenances; and also the indenture of lease and every clause, article and condition therein expressed and contained," is a lien upon a right reserved in the lease to a renewal of the term for a further period of time, or, in default thereof, to payment from the owners of the property of the value of the buildings standing upon the property at the time of the expiration of the lease; and a suit to foreclose it can, therefore, be maintained after the expiration of the lease; and such effect is not defeated by a subsequent clause declaring that the mortgagee should have and hold the indenture of lease and the other premises granted, for and during all the rest, residue, and remainder of the term of years then to come and unexpired.

Payments upon the mortgage debt made by the executor of the deceased mortgagor after the assignment of the mortgaged

lease will keep the debt alive and authorize a foreclosure of the mortgage as against such assignee after the time when the debt would have been barred by the statute of limitations if it had not been for such payments.

Appeal from a judgment of foreclosure recovered on a trial at Special Term.

The mortgage sought to be foreclosed by this action was upon a leasehold interest in certain property demised to defendants' testator in 1850 for a term of 28 years with a right of renewal for a further period or in default thereof to payment from the owners of the property of the value of the buildings standing upon the property at the time of the expiration of the lease. By the terms of the mortgage it covered "the edifices, buildings, rights, members, privileges and appurtenances belonging or in any wise appertaining to the property mortgaged; and also, all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity, of the mortgagor of, in and to the said demised premises, and every part and parcel thereof, with the appurtenances; and also, the said indenture of lease, and every clause, article and condition therein expressed and contained," and by the *habendum* the mortgagee was "to have and to hold the said indenture of lease and other hereby granted premises for and during all the rest, residue, and remainder of the said term of years yet to come and unexpired."

This action was not commenced

until after the expiration of the term of years granted by the lease, and it was, therefore, claimed that it could not be maintained.

*Norwood & Coggeshall*, for applts.

*A. P. & W. Man*, for respts.

*Held*, That the granting clause of the mortgage was clearly so broad as to include not only the leasehold estate, but every right and privilege secured by the execution and delivery of the lease, including the right to payment for the buildings erected on the premises, and that it was not reduced in its effect by the succeeding clause declaring that the mortgagee should have and hold the indenture of the lease and the other premises thereby granted for and during all the rest, residue and remainder of the term of years then to come and unexpired, 24 Hun, 478; 31 id., 1, and the mortgage was, therefore, still an encumbrance upon the remaining rights and privileges created by the lease although the term itself in the land had expired, and, consequently, the action could be maintained.

The bond and mortgage in suit matured on June 2d, 1857, and the action to foreclose the mortgage was not commenced until 1884, and it was claimed by defendants that it was barred by the statute of limitations. This defense was met by proof on the part of plaintiffs of payments made upon the bond by the executor of the mortgagor as late as 1875. It was further claimed, on the part of the defendant, Sarah M. Duryee, to whom the mortgaged

lease had been assigned, subject to the mortgage, that these payments did not keep the mortgage alive so that it could be foreclosed against her.

*Held*, That the statute of limitations very plainly did not prevent the foreclosure of the mortgage. 13 Hun, 163.

Judgment affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

### FORECLOSURE SALE.

N. Y. SUPREME COURT. GENERAL TERM. · FIRST DEPT.

*Peter Moller et al., ex'rs, respts., v. Joseph W. Duryee et al., ex'rs, applts.*

Decided May 8, 1885.

A purchaser of a leasehold interest in real property at a foreclosure sale thereof is entitled to have allowed him as cash upon such purchase the amount due for taxes, etc., upon such property when, by the terms of the lease purchased, such taxes were to be paid by the tenant.

The probability that an obligation upon the tenant to pay the taxes, etc., upon the property leased would accompany a lease for twenty-eight years is so strong as to require only formal evidence to sustain it as a fact in support of a motion based upon it.

Although the lease itself was not produced in the court below upon the argument of a motion based upon it, but its terms were proved by affidavit merely, still the court at General Term may receive and act upon the lease.

This action was brought to foreclose a mortgage upon a lease for twenty-eight years of certain real property of which defendants were lessees. A judgment of foreclosure and sale was entered under which the lease was sold and bought by one O. By the judgment which

was entered the referee was directed to allow to the purchaser any lien or liens upon the premises so sold, and after such sale a motion was made by O. to have the referee directed to allow him as cash paid upon the purchase price the amount of certain unpaid taxes, etc., which were liens upon the property leased. This motion proceeded upon the affidavit of O., which stated that he was informed and believed that the leasehold premises were subject to the taxes, and that by the terms of the lease it was the duty of the tenant to pay them. Upon this motion an order was entered directing the referee to credit the purchaser with the amount of such taxes, and from that order plaintiffs appealed, claiming that there was no proof of the terms of the lease before the court, and that even if there was, the purchaser was not entitled to such order. Upon the appeal a certified copy of the lease was produced by the respondents.

*Norwood & Coggeshall*, for appls.

*William Man*, for respts.

*Held*, That while it is true that the fact that the lessee had become obligated to pay taxes and assessments was very imperfectly stated, inasmuch as it was merely set forth on information and belief, still the probability that this obligation would accompany a lease for a term of twenty-eight years was itself so strong as to require only formal evidence to sustain it as a fact in support of the motion, and the court had, therefore, proof before it from which to find such

fact, and that all possible doubt concerning it was removed by receiving and considering the lease upon the argument of the appeal, as the court had a right to do. 40 Barb., 449, 455; 45 N. Y., 166, 168; 57 id., 363.

That the order was in harmony with the judgment, which contemplated the payment of liens existing against the property.

Order affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurs.

## CRIMINAL LAW.

### N. Y. COURT OF APPEALS.

The People, *respts.*, v. Lyon,  
*applt.*

Decided June 2, 1885.

Defendant was convicted on an indictment charging him with feloniously obtaining from B., city treasurer, funds of the city and converting them to his use. There was no count charging him as accessory. The evidence showed that B. deposited the funds in a banking house of which he and defendant were members and they were used in their business; that defendant was away at the time, and that an understanding existed between them that the city funds were so to be used. *Held*, That defendant was at most an accessory before the fact and could not be convicted under an indictment charging him as a principal.

L., the defendant, was convicted under Chap. 19, Laws of 1875, upon an indictment charging him with having fraudulently and feloniously obtained and received from B., who was then treasurer of the City of Buffalo, \$2,200 of the funds of that city held by B. as such treasurer. The second count of the indictment charged L. with



feloniously and wrongfully obtaining said money and that he converted it to his own use. In both counts L. is charged as a principal and there is no count charging him as an accessory. The money was not received by L. personally. It was deposited by B. or by his direction at the banking house of L. & Co., in said city, of which firm B. & L. were members, and was used by that firm in its business. L. had no knowledge of the particular transaction upon which he was indicted, having been in Utah for about a month at that time and not returning to Buffalo until about ten days after. The prosecution, to establish that an understanding existed between B. & L. that the city funds should be used by the firm of L. & Co., whenever required, relied upon evidence that on prior occasions B. had with the knowledge of L. used the funds of the city in his hands as treasurer in the business of the firm.

*Samuel Hand*, for applt.

*Edward W. Hatch*, District Attorney, for respts.

*Held*, That under Chap. 19, Laws of 1875, 2 R. S. 702, § 30, the offense for which L. was indicted was a felony; that there is no evidence upon which his conviction as a principal could be sustained, he not having been actually or constructively present at the commission of the offense; that the most that could be claimed is that the evidence tended to prove that L. was an accessory before the fact, and as such he could not be convicted under an indictment charging him as a principal. 4

Den., 129; 51 N. Y., 224; 5 Parker, 121; Russell on Crimes, 27; Horton's Crim. Law, § 114; 83 N. Y., 409, 412, 413; 8 Cow., 238; 14 Wend., 31; 3 Barb. Ch., 451, 462; 3 Barb., 20, 29; 1 Parker, 39; 26 Hun, 378; 88 N. Y., 586.

*Fassett v. Smith*, 23 N. Y., 252, distinguished, limited and disapproved.

Judgment of General Term, affirming judgment of conviction, reversed.

Opinion by *Rapallo, J.* All concur.

#### FOREIGN ASSIGNEE. BANKRUPTCY.

#### N. Y. COMMON PLEAS. GENERAL TERM.

*In re assignment of Haynes & Sanger to Waite.*

Decided March 13, 1885.

An assignee appointed by a foreign court in bankruptcy proceedings taken *in invitum* acquires no title to property of the bankrupt beyond the limit of the court's jurisdiction. And this is so, whether the question arises between the bankrupt and the assignee, or between the assignee and creditors of the bankrupt residing in this State.

Appeal from an order confirming the report of a referee.

The report denied the right of Schofield, as assignee in bankruptcy of Pendle & Waite, under appointment of an English court, to compel Waite, as assignee for the benefit of the creditors of Haynes & Sanger, to pay to Schofield, as such assignee in bankruptcy, the amount of a preferred debt secured to Pendle & Waite by the assignment to Waite.

Waite went from America to England for the purpose of bringing himself within the jurisdiction of the English Court of Bankruptcy, but the proceedings by which he was adjudicated a bankrupt were actually and in good faith opposed by him. He and his partner, Pendle, expected to get the benefit of certain provisions of the English laws that enable a debtor to "liquidate his affairs by arrangement or composition with his creditors," but those expectations not having been realized, hostile proceedings were instituted by their creditors, which resulted in the adjudication that Pendle & Waite were bankrupts, and in the appointment of Schofield as trustee in bankruptcy. No creditor of Pendle & Waite made any claim upon the property that Schofield attempted to reach, and the controversy was between the bankrupts and their trustees in bankruptcy. The sole question was, who is entitled to the property belonging to the bankrupts that was in the State of New York?

*Payson Merrill*, for applt.

*William Blaikie*, for resp't.

*Held*, That there is no ground for holding that Schofield should be treated as a trustee acting under a voluntary assignment. His title to the property of Pendle & Waite is such and only such as was conferred upon him by operation of British Bankruptcy Statutes. Such being the position of Schofield, he has no claim upon such property of Pendle & Waite as may be found in this country.

An assignment *in invitum*, un-

der the law of one state or nation, has no operation in another, even with respect to its own citizens. A bankrupt subject of the very country under whose laws he was proceeded against may, on crossing the territorial line, dispose of the property that he has brought with him, and may withhold it from the creditors who are proceeding against him in the foreign jurisdiction. 3 Wend., 538; 23 id., 91.

There is a marked distinction between a voluntary conveyance of property by the owner and a conveyance by operation of law in cases of bankruptcy *in invitum*. A statutable conveyance (that is, a conveyance made under the authority of the Bankruptcy Act in involuntary bankruptcy) cannot operate upon any subject but what is within their territory. *Id.* It matters not whether the question arises between the bankrupt and the assignee, or between the assignee and creditors of the bankrupt who reside in the State of New York, because whoever his adversary may be the assignee must fail inasmuch as he cannot establish a title to property that never was subject to the orders of the foreign court.

It did not appear that Schofield made any demand for the money before the assignee had paid it to Pendle & Waite, the bankrupts.

*Held*, That this furnished another ground for confirming the order.

The assignment commanded the assignee to pay Pendle & Waite, and if he paid them before Schofield made any claim to the money

no official misconduct could be imputed to him, and his sureties would not be liable upon the bond. Schofield's remedy, if he have any, would then be an action against Pendle & Waite for the money. But if the assignee paid the money after receiving notice of Schofield's demand, his sureties would be responsible, provided that Schofield be entitled to the money. No order disallowing the accounts of the assignee, and his payments to Pendle & Waite, should be made without proof that the payment was made in disregard of Schofield's demand. It may be said that Waite, as one of the bankrupts, had notice of Schofield's rights, but that contention, though specious, is not well founded. Waite knew that Schofield had been appointed assignee, but he could not know that the latter would assert title to property that was not within the jurisdiction of the court that appointed him.

Order affirmed, with costs.

Opinion by *Van Hoesen, J.*; *Daly, Ch.J.*, and *Larremore, J.*, concur.

#### EVIDENCE. TITLE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Josephine Cornell, *respt.*, v. Frances R. Cornell, *applt.*

Decided April, 1885.

In an action by an administratrix to recover property claimed to belong to the estate the declarations of her intestate relative to his purchase of the property in question are not competent in her behalf.

Evidence that a lease of land was assigned to the intestate by written assignment

and that the saw-mill thereon was also assigned to him is sufficient to show that he had the legal title to the lease and mill.

Appeal from judgment in favor of plaintiff, entered on verdict.

Replevin to recover one hundred and sixty-six articles to which plaintiff claimed title as administratrix of the estate of her deceased husband.

Defendant, who was the mother of the deceased, denied plaintiff's title.

The jury found the title to a large portion of the articles, amounting to \$1,664.12, in plaintiff, with six cents damages for detention, and also found title to a large number of articles to be in defendant.

Among other articles plaintiff recovered one yoke of oxen, the value of which was assessed at \$102.

On the trial one W. was called by plaintiff and testified that he knew of some oxen that deceased bought. He was asked if deceased came to him to borrow money to make the purchase. This was objected to. Plaintiff's counsel offered to show that the day before the purchase deceased came to the witness stating he wanted some money to buy the oxen and that the next day the oxen came there. This was objected to as incompetent, and the court ruled that it was a circumstance that bore upon the question and that it would be for the jury to say, on all the evidence, what the fact was. The witness then answered, "He came to me with reference to the purchase

of the oxen." He was then asked, "What did he say?" to which the same objection was interposed. The court remarked, "You may prove the fact he came there and borrowed money to pay for a yoke of oxen." The witness then answered, "I let him have \$100; he went right away that night; some time after that I saw the oxen and he said these were the oxen he bought; they were stags."

*Smith & Robertson*, for applt.

*Hill & Stanchfield*, for respt.

*Held*, That the rulings were erroneous. Declarations of the deceased were not competent in behalf of his administratrix, the plaintiff. What the deceased said in respect to the purchase which he had in view in borrowing the money was not competent and was erroneously received. 75 N. Y., 461. We have looked through the evidence given on the trial in respect to the title or ownership of the oxen in question and it is not so clear and satisfactory as to enable us to say that the erroneous evidence worked no harm to defendant.

*Also held*, That there was some evidence tending to support the verdict in regard to the other articles allowed, and therefore we cannot disturb it.

Defendant sought to prove that she executed a mortgage upon her real estate. The court held, in the exercise of its discretion, that this fact was immaterial.

*Held*, No error. It was not material to the issue to show who worked for defendant after the death of plaintiff's intestate, nor

that \$5 was paid to one R. by defendant after the death of her son; nor to show the course of business adopted by defendant after the death of her son.

It appeared that the lease of a lot on which the sawmill was situated was transferred by written assignment to deceased May 20, 1881, by one G., and that on the same day G. assigned the mill, machinery and appurtenances to deceased.

*Held*, That the evidence was sufficient to show that he had the legal title to the lease and to the sawmill property.

*Also held*, That the verdict should not be disturbed because the jury failed to find title to a certain bull to be in plaintiff or defendant. By a failure to find plaintiff acquires no title out of the judgment to that animal.

Judgment reversed and new trial ordered, costs to abide event, unless plaintiff stipulates to amend verdict by striking out the oxen and their value, in which case judgment so amended affirmed without costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

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#### RAILROADS. NEGLIGENCE. N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James F. Brooks, *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided June, 1885.

A passenger has the right to assume that the company will provide a safe way to board its train, and that the way taken by other passengers without objection by the company is the right one.

It is not necessarily, as matter of law, too late for a passenger to board a train after it has begun to move from the station.

Failure of defendant's servants in charge of the station to warn a passenger of danger from an approaching train, under the circumstances, *held*, negligence.

Appeal from judgment on verdict at Circuit, and from order of Special Term denying motion for new trial on a case.

Action to recover for personal injuries received by plaintiff while crossing defendant's main track at the depot in Belmont, in an attempt to reach a train on a switch beyond the main track. Plaintiff went into the station house to buy a ticket, and while he was there the train, which was standing still when he went in, began to move off and was in motion when he came out. He rushed out onto the platform which fronted the depot and jumped from the platform on the main track, where he was immediately struck by a train which was then coming in from the east. The platform was at that point about three feet above the level of the track. It extended in front of the station house, and at the west end it sloped down gradually to the level of the track, forming a conveniently accessible way by which passengers usually went from the depot to cars on the switch. The evidence tended to show that on the occasion in question several passengers had, to plaintiff's knowledge and without objection from defendant or its employes, taken the same way that plaintiff took to reach the train. While plaintiff was getting his ticket he heard the conductor of the train he

intended to take call "all aboard," and he testified that he hurried more for that reason. The testimony tended to show that when plaintiff came out of the depot the motion of the train on the switch was at a moderate rate. There was no evidence that plaintiff had actual notice of the train from the east. He testified he did not hear or see it till it was too late to escape it. S., a witness called by defendant, testified that he was the assistant station agent at Belmont when the accident happened; that he had charge of taking care of the passengers there; that he and D., the station agent, were the only persons there having charge; that either of them would have been justified in taking care of passengers and seeing that they were in a place of safety; that about the time the train from the east was due he stepped out onto the platform and plaintiff passed him going in on a run; that he heard plaintiff ask for a ticket for Wellsville and return, to which place the train on the switch was bound; that that train started about the time plaintiff went into the office; that witness "had not given plaintiff any direction nor heard any given him that the train from the east was coming;" that he saw plaintiff come out of the office on a run, and that the train from the east was then in close sight.

*E. C. Sprague*, for applt.

*H. W. Sanford*, for respt.

*Held*, That there was no error in leaving it to the jury to say whether the train was moving so

fast as to render it unsafe or improper for plaintiff to take it. There was no error in charging the jury that if they answered the first question affirmatively, plaintiff had no right to pass over the intervening track in an attempt to reach and take the moving train, and it was negligence on his part to undertake to do so; and that if, on the other hand, the motion of the train was so very slight that plaintiff could probably take it with as much ease and security as if it was standing still, his attempt to do so was not negligent by reason of the fact that the train was then in motion. 17 Hun, 395; S. C. affd., 78 N. Y., 338.

It was not error to admit evidence that other passengers had, to plaintiff's knowledge, taken the way plaintiff took to reach the train without objection on defendant's part. 13 Hun, 625; 40 N. Y., 145; 49 id., 177.

The evidence warranted a finding that defendant's employes were negligent in not warning plaintiff of the approach of the train from the east.

Judgment and order affirmed.

Opinion by *Smith, P. J.*; *Barker*, and *Haight, JJ.*, concur; *Bradley, J.*, not sitting.

#### PLEADING. COVENANT. JUDGMENT.

##### N. Y. COURT OF APPEALS.

*Krower et al., ex'rs., respts., v. Reynolds, applt.*

Decided June 2, 1885.

A complaint set up the making of a mortgage on lands in another State; an assign-

ment thereof to plaintiff's testator; a sale of the mortgaged premises to defendant and the assumption by him of the mortgage; the foreclosure of the mortgage in a court of general jurisdiction of the State where the premises were situated, and the due recovery of a judgment against defendant on his covenant to pay. *Held*, That the complaint set up only a cause of action on the judgment.

In an action upon covenant it is necessary to allege a breach.

Reversing S. C., 19 W. Dig., 383.

The complaint in this action alleged the making of a bond and mortgage by S. to C.; an assignment to O., plaintiff's testator; the subsequent purchase of the mortgaged premises by R., the defendant; the assumption by him of the mortgage, and his consent to pay the same in consideration of the purchase and conveyance; the subsequent commencement by O. of an action to foreclosure the mortgage in the Court of Chancery in New Jersey, alleged to be a court of general jurisdiction, against S., R. and others, by process duly issued and served on the defendants therein, in which action judgment was duly recovered by the plaintiff against R., Oct. 26, 1877, for \$5,053.78, on his liability on his covenant and the death of O. and appointment of plaintiffs as his executors. Judgment was demanded against R. for \$5,053.78 with interest from Oct. 26, 1877. The trial court held that the complaint set forth two causes of action, one upon the covenant and the other upon the deficiency judgment against R., founded on the covenant, rendered by the New Jersey court. Defendant claimed that the complaint only set forth a

cause of action on the judgment, and as plaintiffs had failed to prove a valid judgment against R. moved that the complaint be dismissed. This motion was denied.

*Quincy Van Voorhis*, for applt.

*George F. Yeoman*, for respts.

*Held*, Error; that the pleader intended to set forth only a cause of action on the judgment, and inserted the allegations as to the bond and mortgage and the assumption of the debt by the defendant and his covenant to pay the mortgage only by way of introduction or inducement to the final fact, viz.: the recovery of the judgment.

*Also held*, that the complaint does not contain the averments necessary to a complete cause of action on the covenant; that it was necessary to allege a breach. 83 N. Y., 23.

Judgment of General Term, affirming judgment on verdict for plaintiffs, reversed, and new trial ordered.

Opinion by *Andrews, J.* All concur.

### USURY.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Susan M. Chesebro*, respt., v. *J. Warren Tilden*, impl'd., applt.

Decided April, 1885.

Where the borrower, in addition to interest, agrees to pay the expense of a search and for getting the papers ready, this is not a basis for usury.

The payment by the borrower and surrender of a note executed by the lender in addition to interest on the sum borrowed is not usury when such payment is made as a fair compensation for the trouble and

expense to which the lender was subjected and not as a device to obtain more than legal interest.

Appeal from judgment of foreclosure.

The answer of defendant T. set up the defense of usury, in that he, in addition to interest, was to pay and surrender a note of one G. held by T.'s father for \$22 and also to pay for the search and for preparing papers \$10.

It appeared that T. desired to borrow \$100 and applied to one S. to loan it. S. did not know him, but did the Gs and agreed to lend to them and they agreed to take it and give security and let T. have it. T. gave the mortgage to the Gs and received the money and paid the \$10 to S.

The evidence as to an usurious agreement was conflicting, the assertion that there was usury resting principally on the evidence of T., who was contradicted by plaintiff's witnesses in some essential respects.

The court held that the payment of \$10 was not the basis of usury, but was for getting the search and papers ready, etc., and the jury found for plaintiff.

*Howe & Ree*, for applt.

*H. E. Nichols*, for respt.

*Held*, No error; that it was for the jury to say which of the witnesses testified truthfully. They had a right to discredit or disbelieve T., the party who was so much interested in making out a defense of usury. 45 N. Y., 549; 70 id., 177; 73 id., 609; 78 id., 287; 20 W. Dig., 165.

The court refused to charge that

"No relation of borrower and lender existed between them. (S. & T)."

*Held*, No error. Upon all the evidence in the case there was a question of fact as to whether the loan was by S. to T. T. made the application for the loan to S. who distrusted T.'s security, but was willing to make the loan to and for T. if the security by way of G.'s mortgage was made satisfactory.

*Also held*, That it was not error to receive in evidence the several mortgages made in furtherance of the original arrangement.

*Also held*, That the law was properly laid down in the charge. If the note of \$22 was paid and surrendered as a fair, honest measure of the trouble and expense to which the Gs were subjected and not as a trick or device or scheme to obtain more than 7 per cent. there was no usury. The jury have found that there was no corrupt agreement or intent to evade or violate the law under a charge within the doctrine of the reported cases. 19 Johns. 160; 38 N. Y., 281; 2 Den., 119; 69 N. Y., 342.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

#### NEGLIGENCE. ABATEMENT.

N. Y. COURT OF APPEALS.

*Hegerich, adm'r., respt., v. Keddie, ex'r., applt.*

Decided June 9, 1885.

A cause of action under the statute of 1847 to recover damages for the death of a person resulting from injuries caused by the negligence of another, where no injury

to the estate or property of the deceased is claimed, abates by the death of the wrong-doer.

Reversing S. C., 18 W. Dig., 528.

This action was brought to recover damages for the death of H., plaintiff's intestate, alleged to have been caused by the negligence of defendant's testator. H. was killed July 21, 1881. On August 26, 1882, C., defendant's testator, died. This action was not commenced till in the spring of 1883.

*John L. Lindsay*, for applt.

*George V. N. Baldwin*, for respt.

*Held*, That the cause of complaint herein was one arising out of the death alone of plaintiff's intestate and one which suggests no injury to his estate or property; that such a cause of action is abated by the death of the wrong-doer. 75 N. Y., 192.

*Yertore v. Wiswall*, 16 How. Pr., 8, overruled.

Judgment of General Term, reversing judgment of Special Term sustaining demurrer, reversed, and judgment of Special Term affirmed.

Opinion by *Ruger, Ch. J.* All concur; *Finch, J.*, in result.

#### LIMITATION. BANKS.

N. Y. COURT OF APPEALS.

*Brinckerhoff et al., applt., v. Bostwick et al., respts.*

Decided May 8, 1885.

The words "a liability created by law," in § 394 of the Code, mean simply a liability created by some statute.

The liability of bank officers for negligence or misconduct is a common law liability arising from their relations to the bank and the manner in which they discharge



the duties thereof, and an action thereon is subject to the limitation of ten years prescribed by § 388.

Reversing S. C., 20 W. Dig., 463.

This action was brought by plaintiff, a stockholder of a national bank which had become insolvent, on behalf of himself and all the other stockholders against defendants, all of whom had been directors, and one of whom had been appointed receiver of the bank, to recover damages on account of the misconduct, carelessness, negligence and inattention of defendants. Defendants demurred to the complaint and the demurrer was overruled. 88 N. Y., 52. Thereafter other stockholders were allowed to come in and be made plaintiffs on their petition and defendants answered denying all the allegations of misconduct and set up as a defense the three and six years statute of limitations.

*O. D. M. Baker* and *E. A. Brewster*, for appts.

*Samuel Hanul*, for respts.

*Held*, Untenable; that § 394 of the Code of Civil Procedure, which provides that "an action against a director or stockholder of a monied corporation or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law," must be brought within three years of the time of action has accrued, does not apply. The words "a liability created by law," mean simply a liability created by some statute. The liability sought to be enforced in this action against defendants is a common law liability springing out of their relations to the bank and the man-

ner in which they discharged their obligations and duties thereof. The limitation applicable to this action is ten years, that which is prescribed by § 388 of the Code. This is an equitable action, and plaintiffs stand in the place of the receiver, who if he had prosecuted the action would have stood in place of the bank, and have had the same rights it would have had if plaintiff. Ang. & A. on Corps., §§ 312, 314; 3 Paige, 322; 8 Blatch., 347; 88 N. Y., 52. For the purposes of the statute of limitation the action must be treated as if it had been originally brought by all the stockholders.

*Cunningham v. Pell*, 5 Paige, 613; 6 id., 655, distinguished.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Earl, J.* All concur.

#### FIRE INSURANCE. EVIDENCE. N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Isaac B. Ellsworth et al., respts., v. The Aetna Ins. Co., applt.*

Decided June, 1885.

Where witnesses are unable to state the items composing a stock of goods destroyed by fire and their prices, it is proper for them to refresh their recollection by reference to an inventory of the goods, in the taking of which the witnesses participated, and to a copy of a statement in the handwriting of one of them of footings made by both, the original having been destroyed.

Appeal from order of Special Term denying motion for new trial on a case with exceptions.

Action on policies of insurance

against loss by fire on goods, etc., in a country store. Of the items of evidence admitted on the question of value one was an inventory of the stock purchased by plaintiffs of their predecessors in the store, specifying the items and prices of the articles purchased. The evidence tended to show that part of the goods so purchased remained in the store and were burned. Another item of evidence was a written statement of footings of an inventory taken by plaintiffs a few days before the fire, and originally entered in certain pass books, each page of which was footed and the amount entered on a loose piece of paper, and those amounts were subsequently transferred to the first inventory above mentioned. The pass books and loose papers were destroyed by the fire. Plaintiffs assisted in making the first inventory and the later one was made by them alone. Both took part in making the footings, and one of them transferred them to the old inventory. Each plaintiff, having testified at the trial that he was unable to remember the items and prices of the contents of the store at the time of the fire, was permitted to refer to the inventory and the statement of footing; to refresh his recollection; and after they had testified, the inventory and footings were received and read in evidence.

*W. B. Hoyt*, for applt.

*J. L. Walker*, for respts.

*Held*, No error. Although the statement was but a copy, it was properly referred to because it was the best evidence. The inventory

was properly received in evidence as a detailed statement of the items testified to and their prices, and the statement of footings was properly received upon the like ground. 77 N. Y., 592.

Order affirmed.

Opinion by *Smith, P. J.*; *Haight* and *Bradley, JJ.*, concur; *Barker, J.*, not sitting.

#### ATTORNEYS. UNDERTAKING.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

James A. Sheridan, *applt.*, v. Hiram Farnham, *respt.*

Decided April, 1885.

General authority to an attorney to collect does not imply the right to receive an assignment of personal property in payment of the debt.

The defendant in an action on the morning of the return day of the summons executed an assignment of certain personal property to her father in alleged payment of a debt and delivered it to his attorney, who is not shown to have had authority to receive anything but money; the attorney delivered it to a son of his client who delivered it to his father in the evening. In an action upon an undertaking given on the adjournment of the action that afternoon the witnesses who testified in relation to the assignment and its delivery were all interested in the event. *Held*, That there was evidence sufficient to sustain a finding that there was a breach of the conditions of the undertaking.

Appeal from judgment of County Court, reversing judgment of Justice's Court in favor of plaintiff.

Action on an undertaking given to procure an adjournment on joining of issue in an action brought by this plaintiff against one Hattie

Farnham. The undertaking was given about three o'clock in the afternoon of Aug. 13, 1881, and was conditioned that the principal should not dispose of any of her property liable to sale on execution except for the support of herself. That action was brought to recover the purchase price of a cabinet organ. Judgment was rendered for plaintiff, and an execution issued and returned unsatisfied.

In this action it appeared that Hattie Farnham in the forenoon of Aug. 13, 1881, executed an assignment of the cabinet organ to her father, this defendant, professing for a board bill which she alleged she then owed him. The assignment was drawn by D., an attorney employed to collect said bill, and as defendant claims was delivered to a son of defendant to be taken to defendant's home and there delivered to him, which latter delivery did not take place until the evening of that day.

The persons who testified in respect to the assignment and its execution, its reception by the brother and delivery to the father on the evening of Aug. 13th, were either interested in the event of this action or related to defendant. It was not shown that D. had authority to accept in payment anything but money.

The justice found the facts in favor of plaintiff, and the County Court reversed his decision.

*P. M. French*, for applt.

*M. E. Driscoll*, for resp't.

*Held*, Error. Where an attorney is employed to collect he is not

authorized to receive in payment of the debt placed in his hands for collection anything but money unless a special instruction or authority is given to that effect. 63 N. Y., 185. General authority to collect does not imply the right to receive an assignment of personal property in payment of a debt due to a client.

It was a question for the justice to determine whether or not such authority was possessed by Edward Farnham as made the reception of the assignment by him and so carried to his father and the reception by the father an acceptance by the father of the assignment; in other words, whether or not any complete assignment or transfer of the organ took place before a manual delivery to the father of the instrument executed by Hattie, was a question of fact to be determined upon all the evidence relating thereto, and the justice has found those facts in favor of plaintiff.

That the persons testifying in regard to the assignment and its delivery were either interested in the event of this action or were so related to defendant that it was a question for the justice to determine whether their testimony should be believed or not. 45 N. Y., 549; 70 id., 172; 73 id., 609; 75 id., 591; 78 id., 287; 92 id., 490; 8 Hun, 424; 31 id., 399.

That under the rule quoted there was evidence before the justice sufficient to sustain the finding that there had been a breach of the undertaking executed by Hattie to the plaintiff in this action

upon procuring the adjournment on Aug. 13, 1881, and that no error was committed in the progress of the trial was called upon the County Court to reverse the judgment.

Judgment of County Court reversed and that of Justice's Court affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, J.J.*, concur.

### EXECUTORS.

#### N. Y. COURT OF APPEALS.

*Remington, respt., v. Walker, ex'r, impl'd, applt.*

Decided April 28, 1885.

Testator's will bequeathed \$2,500 to plaintiff, which was to be kept invested by the executors, and out of the income they were to pay for her support and education and pay the principal and accumulations of interest to her at the age of 21. No fund was set apart for her and no re-investments of accumulated interest were made. A bond and mortgage for \$2,500 given to testator by one of the executors and on which some payments had been made was assigned to plaintiff, and on foreclosure the mortgagor paid the contract debt with simple interest. *Held*, That the mortgage could not be considered a trust fund set apart for plaintiff's benefit; that an account should be made from the beginning of the executorship, and full interest charged on the principal of the legacy.

This action was brought by plaintiff, a legatee under the will of her grandfather, for an accounting and the payment of her legacy of \$2,500. That sum was to be kept invested by the executors, and out of its income they were to pay such amounts as in their judgment should be needed for plaintiff's support and education, and the

principal with accumulations of interest was to be paid to her at the age of twenty-one. The will also gave some small specific legacies, and then bequeathed the rest and residue of the estate to the testator's daughter, E., to be paid to her after five years or more if the executors should deem best, and in the meantime to be kept invested. The referee has found that the executors wilfully neglected and omitted to perform their duty as such to plaintiff by omitting to set apart the amount of the legacy and by omitting to re-invest from time to time the accumulations of interest accruing upon it. The estate was sufficient to pay plaintiff the amount due. There were three executors, all of whom qualified, two of them being sons of the testator; they managed the estate until April 12, 1859, when all the securities and the money on hand were turned over to W., defendant's testator, the other executor, and he then became the sole acting executor. Among the securities was a bond given by M., one of the executors, to the testator for \$2,500, secured by a mortgage on the farm of the obligor. On June 16, 1858, M. had paid thereon \$144, and had made three payments later amounting to about \$200. With these exceptions M. had paid nothing for twenty years. In 1870 he gave notice to W. that he could not pay. The mortgage was assigned to plaintiff, and on being foreclosed M. paid the contract debt with simple interest. This action was then brought

against the two surviving executors for the non-performance of their duty under the will.

*E. A. Nash*, for applt.

*J. M. Dunning*, for respt.

*Held*, That the mortgage of M. could not be considered as a trust fund set apart for the benefit of plaintiff; that an account should be made up from the commencement of the executorship to the decree against both executors, and full interest should be charged upon the principal of the legacy.

The respective liabilities of the executors between themselves are after questions. 74 N. Y., 539.

Judgment of General Term, affirming judgment for plaintiff on report of referee, modified, and as modified affirmed.

Opinion by *Finch, J.* All concur.

## LANDLORD AND TENANT. NEGLIGENCE.

N. Y. COURT OF APPEALS.

*Odell, infant, respt., v. Salomon et al., applts.*

Decided May 5, 1885.

A covenant by a tenant to repair does not enure to the benefit of a stranger who sustains an injury in consequence of its breach, but can only be enforced by the landlord or his assigns.

The owner or occupant of a building is not chargeable with the duty of constant inspection of the premises; reasonable care in their use so that they do not cause injury to others is all that the law requires. The fact that a defect was discovered by an expert after close examination and keen scrutiny is not sufficient to charge the owner or occupant with negligence in not having discovered and remedied it.

This action was brought to re-  
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cover damages for injuries received by plaintiff through the falling of a window sash upon her while passing premises in the City of New York. Both the lessors and the lessees were made parties defendant. The lease contained a covenant on the part of the tenants to keep the demised premises in repair.

The complaint was dismissed as to the lessees, and a judgment was rendered in favor of plaintiff against the lessors.

*Adolph L. Sanger*, for applts.

*Alfred Pagelow*, for respt.

*Held*, That plaintiff was not entitled to recover on account of the failure on the part of the tenants to perform their covenant to keep the premises in repair. Such a covenant does not enure to the benefit of a stranger who sustains an injury in consequence of its breach, but can only be enforced by the covenantee or his assigns, and their right to recover depends upon different principles than those which govern in an action by a stranger. A lessee occupying real estate may become liable to a stranger by negligently suffering the demised premises to become dangerous. The foundation of his liability is culpable negligence. He is not as to third persons the guarantor of safety or condition of the premises, but is bound only to reasonable care in his use and occupation of them, so that they may not cause injury to others.

The owner or occupant of the building is not chargeable with the duty of constant inspection which is required of railroad

managers and others managing dangerous machinery liable from its nature to become defective and cause injury. Reasonable care is all the law requires, and what is reasonable care depends upon the nature of the property, and the dangers ordinarily to be apprehended in its use.

It was proved that a public officer, an expert in such matters, went to the premises after the accident in the performance of his official duty for the express purpose of searching for the defect; that he discovered it by close observation and keen scrutiny, aided by his knowledge of the mode of constructing such sashes.

*Held*, That this was not sufficient to charge defendants with negligence in not having discovered and remedied the defect before anything occurred to call attention to it.

Judgment of General Term, affirming judgment for plaintiff against the landlords defendants, reversed, and new trial granted.

Opinion by *Rapallo, J.* All concur.

#### TRESPASS. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Teunis W. Vandenburgh, *respt.*,  
v. The Boston & Albany R.R. Co.,  
*applt.*

Decided May, 1885.

In an action to recover damages for being deprived of the use of a farm crossing while defendant was rebuilding a bridge a witness was allowed to testify what in his opinion was the difference in value of the use of the farm without and with the obstruction. *Held*, proper.

The action was for damages in trespassing on a certain farm and because, as alleged, defendant took an improperly long time to repair a bridge. This bridge, the only exit for plaintiff, was over the railroad track. Defendant removed the bridge and did not replace it in two months. At this point the railroad passes through a cut.

*John Cadman*, for applt.

*W. W. Brownell*, for respt.

*Held*, That the evidence objected to was competent. Plaintiff had stated at length how the removal of the bridge had injuriously affected his farming operations. He was then allowed to state what in his opinion was the difference in value that season of the use of the farm with the bridge in place and out of place during the period of alleged unreasonable delay. He answered \$300. We think this was merely a statement of the value in bulk in a case where it is obvious that an inventory of all the items in detail was impossible. The injury was peculiar to this farm, and no other farm is similarly situated. The witness might have been cross-examined as to the manner in which he reached the result he stated. 9 N. Y., 183; 31 id., 91; 55 Barb., 585; 17 N. Y., 340. It is true that a witness may not testify to damages. 2 N. Y., 514. But it is a mistake to suppose that this rule is violated by asking a witness simply what is the difference in value of the subject in one condition and in another condition. It is the preferable method that the witness should speak of the two values, and if he do not do so

on the direct he may be compelled to do so on the cross.

Judgment affirmed.

Opinion by *Landon, J.*; *Bockes, J.*, concurs; *Learned, P.J.*, not acting.

## CORPORATIONS. TRUSTEES.

### N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Charles E. Patterson, rec., *applt.*, v. Daniel Robinson et al., *respts.*

Decided May, 1885.

Where, under § 23, Ch. 40, Laws of 1848, relative to manufacturing corporations, it is sought to hold a trustee upon the ground that he has assented to an increase of the indebtedness of the company in excess of the amount of the capital stock, it is not enough to show that he signed the annual reports. If it appear that he did not attend the meetings of the trustees, took no share in the conduct of the corporation and signed the reports upon the statement of another trustee that they were correct and without any knowledge of the truth of the facts he will not be deemed to have assented to an increase of indebtedness. A failure to dissent is not equivalent to an assent to the creation of the debt within this section.

Where the indebtedness of a corporation is already beyond the amount of its capital the liability of the trustee to those who subsequently become its creditors attaches at the instant the debt is created, and that liability cannot be divested except by the consent of the particular creditor.

Payment to other creditors, by which the aggregate indebtedness of the corporation during the trustee's term is reduced, will not relieve him from liability to that creditor to the creation of whose debt the trustee did assent.

This action was brought against defendants as trustees of a woolen mill under § 23, Ch. 40, Laws of 1848, which provides that if the

indebtedness of any company shall at any time exceed its capital stock the trustees assenting thereto shall be personally liable for such excess to the creditors of the company. The mill was organized in 1865 with \$150,000 capital, which the same year was increased to \$250,000, and which was fully paid in. It manufactured from 1867 to Jan. 1879, when it suspended, owing a bank \$439,000. Plaintiff was appointed receiver of this bank in Oct. 1878, and in July, 1879, recovered judgment against the mill for the above indebtedness; this is wholly unsatisfied. The referee found for defendants.

*O. Gambell*, for receiver.

*E. Cowen, C. A. Waldron and W. C. Holbrook*, for defts.

*Held*, That the judgment should be affirmed as to the defendants Griswold and Kinckerbacker. It appears that the debt of the mill to the bank steadily increased in every year. The referee has found that these two defendants did not assent to the increase of indebtedness. It does not appear that they ever attended any meeting of the trustees or were consulted with reference to the management of the business or participated in its affairs except to sign the annual reports; and then only upon their faith in the assertion of an associate trustee that they were correct. To make a trustee liable under § 23, *supra*, his subsequent failure to dissent is not equivalent to an assent concurring with the creation of an excess of debt.

As to the defendants Robinson and Pinkham the judgment must

be reversed. The question is whether with their assent the indebtedness of the mill increased in their term of office as trustees. We agree with the referee that the interest accruing on a debt to which they had not assented and which was in existence when they came in office is not an increase of indebtedness within this section. But the referee found that on May 1, 1875, when these defendants took office the debt of the mill was to all persons \$134,214, of which \$300,000 was due the bank. That in Jan., 1879, when this action was begun the total debt was \$515,770, of which \$439,000 was due the bank. Thus in the time of Robinson's control the total debt increased only \$81,656, while the interest on the old debt was \$111,444. And because in this view the total debt of the corporation had not increased under Robinson, although the debt to the bank had increased (beyond interest) \$34,000, the referee held that Robinson had not assented to an increase of indebtedness. We think this was error. After May 1, 1875, there was no time when the total indebtedness did not exceed its capital stock. The debt to the bank at all times increased, and beyond accruing interest. Any increase of indebtedness, then, was one upon which the trustees were liable and liable to the creditors to whom this excess was owing. Having gone beyond the limit of the capital any further indebtedness is one as to which the personal liability of the trustee attaches the instant the debt is created. And having once attached

it cannot be divested except with the creditor's consent. Therefore Robinson's liability to the bank could not be discharged save by payment to the bank. The decrease of the aggregate excess of liability caused by paying creditors other than the bank would not cancel Robinson's liability to it. The referee finds that he assented to an increase of liability to the bank for \$34,000 and Pinkham for \$1,382.

Judgment directed against them for these sums and affirmed as to Griswold and Kinckerbacker.

Opinion by *Landon, J.*; *Bockes, J.*, and *Learned, P.J.*, concur.

## NEGLIGENCE.

### N. Y. COURT OF APPEALS.

*Lowery, respt., v. The Manhattan R. Co., applt.*

Decided May 8, 1885.

Live coals fell from one of defendant's engines upon the back of a horse, which thereupon became unmanageable. The driver attempted to drive him against the curbstone to check his speed, but the wagon was overturned, the driver thrown out and plaintiff was run over and injured. *Held*, That the proximate cause of plaintiff's injuries was the wrongful act of defendant and it was liable therefor.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant. It appeared that live coals and ashes fell from an engine on defendant's road upon the back of a horse attached to a wagon, and upon the hand of the driver in the street



below. The horse became unmanageable and ran away, and the driver attempted to guide him and drive him against a post of the elevated railroad so as to stop him; failing to do this, he turned him and attempted to run the horse against the curbstone to make it heavy for him and so arrest his progress. The wagon passed over the curbstone, the driver was thrown out and the plaintiff run over and injured. Defendant claimed that the cause of the injury was too remote to authorize a recovery of any damages, and that the court erred in refusing to dismiss the complaint, and in charging the jury that if they believed that the coals and ashes fell through any negligence of defendant, its servants or agents, and caused the horse to become unmanageable and run against the plaintiff, inflicting injuries upon him, that defendant was liable; it was also claimed that the court erred in refusing to charge that "if the jury believed the injury occurred through the negligence of the driver's error of judgment in endeavoring to obtain control of his horse, plaintiff cannot recover."

*Hugh L. Cole*, for applt.

*Osborn E. Bright*, for respt.

*Held*, That no error was committed by the judge in his rulings; that the injury inflicted upon plaintiff was chargeable to the original wrongful act of defendant, and it is liable therefor; that the driver of the horse having exercised his best judgment in endeavoring to prevent injury in view of the exigency of the occasion his action,

whether prudent or otherwise, may be considered a continuation of the original act, and defendant was liable as much as it would have been if the horse had been permitted to proceed without control whatever. The damages sustained by plaintiff were not too remote, and the wrongful act of defendant having caused the horse to become frightened and run was the proximate cause of the injury, and the running away of the horse and collision with plaintiff the natural and probable consequence of defendant's negligence. 2 Black, 892; 1 Adol. & E., N. S., 29; 13 Reporter, 790; 13 Eng. C. L., 613; 19 Johns., 381; 6 N. Y., 397; 4 Den., 464; 49 N. Y., 420; 56 id., 200; 55 id., 108.

*Ryan v. N. Y. C. RR. Co.*, 35 N. Y., 210; *Penn. RR. Co., v. Kerr*, 62 Penn., 653, distinguished.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Miller, J.* All concur, except *Earl, J.*, not voting, and *Rapallo, J.*, dissenting.

## RECORD.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Eleazar A. Durkee, applt., v. The National Bank of Fort Edward et al., respts.*

Decided May, 1885.

Where the endorser of a note, discounted by a bank and past due, gave to it as collateral security a mortgage upon an agreement that it would not sue him upon said note until it should ascertain, after the foreclosure of another mortgage which it held

against the maker of the note, what sum would remain unpaid upon the note, *held*, that this was a valid extension of time to the endorser and constituted the bank a holder for value of his mortgage.

The property in this case is an insufficient security for the payment of two mortgages, and the question is which shall be paid. The plaintiff's mortgage was delivered earliest and defendant's mortgage recorded earliest. The facts as to the defendant's mortgage are that the common mortgagor, one S. R. Durkee, was endorser upon three notes made by one Wm. Allen, respectively for \$3,100, \$89 and \$3,500. These notes were discounted by the bank and were past due. Allen gave Durkee, Aug. 19, 1881, a mortgage to secure him as endorser, and the latter assigned this to the bank a few days afterwards. The note first above mentioned was due Aug. 22, 1881, the second Oct. 19, and the third Oct. 2. Durkee delivered the mortgage to plaintiff Dec. 3, 1881, and the one to defendant Dec. 5, 1881. Defendant's cashier testified that Allen was insolvent in Dec. 1881; that witness told S. R. Durkee that he thought the Allen mortgage assigned to the bank would not bring enough to pay all the three notes; he suggested that S. R. Durkee give the bank a mortgage to secure the \$3,100 note; that otherwise the bank might sue him; that if he did so the bank would wait until there was a sale under the Allen mortgage, and it then could tell what would remain for Durkee to pay: in the meantime the bank would hold his mortgage. The

Allen mortgage had not been foreclosed and there was no sale under it until Aug., 1882. No action had been brought on the note. The sale had on the Allen mortgage showed a deficiency of \$2,000. The mortgage which S. R. Durkee gave the bank recited that it was intended to secure the payment of Allen's note for \$3,100, etc. "The same to be paid in manner following: \$1,000 in one year; \$1,000 in two years and the balance in three years;" "and if the amount of said note," etc., "shall be paid as above specified then these presents shall be void." The bank had judgment.

*C. Hughes and R. Armstrong, Jr.*, for applt.

*A. D. Wait*, for respt.

*Held*, That although the bank took its mortgage as collateral security for a precedent debt it was still a purchaser in good faith and for value, and so entitled to the protection of the recording act, 1 R. S., 756, §1, because it extended the time of payment of the antecedent debt. The mortgage clearly provides for the payment of the note at a future day and so this case is not like *Cary v. White*, 52 N. Y., 139. There the mortgage only was by its terms payable in the future. In *Cary v. White* the mortgage was not taken in the name of the creditor; here it is. In this mortgage we think the words "the same to be paid," etc., refer to the note and not to the mortgage. The most favorable view for plaintiff is that upon the delivery of the mortgage to the bank it had two days of payment.

for the same note; the one stated in the note and the other in the mortgage. The last statement must prevail. It was made upon a new consideration.

The agreement testified to by the cashier, to wait until they realized upon the Allen mortgage, was a valid one and constituted the bank a holder for value. 42 N. Y., 436; 52 id., 139.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Bockes, J.*, concur.

#### HIGHWAYS. EVIDENCE.

##### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

William H. Brown, *respt.*, v. Dennis Rice, *applt.*

Decided April, 1885.

In an action for obstructing a private road the record book of roads of the town and entries therein indicating the laying out of the road are admissible.

In such action evidence that plaintiff has used the road for over forty years and that there is no other road from his premises to the public highway is competent; so also an award between the parties fixing the width of the road.

Appeal from judgment of County Court, affirming a judgment of Justice's Court in favor of plaintiff for \$2 damages, besides costs.

Plaintiff alleged that he was entitled to the use of a road two rods wide, and that defendant prevented him from using the same by putting stones, sticks, rubbish, and digging the same to plaintiff's damage \$25. Answer, denial.

On the trial before the justice plaintiff offered in evidence the record book of roads of the town,

showing the survey of the road in question as a private road and an agreement by the commissioners of highways, dated September 12, 1836, to establish the same. This was objected to, the objection overruled and the record received in evidence.

Plaintiff was then allowed to testify, under objection, that he had known and traveled this road forty-five years; that he was in possession and occupation of the land on the eastern terminus of this road, and that he had a saw-mill thereon, and that there is no other road leading from the main road or public highway to the saw-mill in question.

*F. David*, for applt.

*Fred A. Marvin*, for respt.

*Held*, That the rulings were correct. The evidence in conjunction with the record was competent upon the question of the extent of plaintiff's possession of the road in question. 5 Wend., 584.

Plaintiff offered in evidence an award made in an arbitration between the parties hereto, by which the arbitrators decided that the private road "across the land of said Rice to the sawmill of said Brown should be of the width required by statute and at least two rods wide." The offer was made "for the purpose of proving the width of the road in question." Defendant objected to the award as incompetent and "brings into question the title to real property which defendant denies." The objection was overruled and the award read for the purpose stated.

*Held*, No error. It was compe-

tent evidence to show that plaintiff had a right of possession in the highway, and was in enjoyment of the possessory right when passing and repassing upon the road in question. It bore upon plaintiff's possession of the road in question. It may be observed incidentally that an inspection of the award would seem to indicate conclusively the right of possession in plaintiff. 8 Hun, 570.

Main v. Cooper, 25 N. Y., 180; 26 Barb., 468, distinguished.

Under all the proof given in the case, we see no force in the suggestion that because it appeared that defendant owned land on both sides of the road he was presumed to be owner of the road; whatever force there may have been in such a presumption under the circumstances ordinarily attending a possession on either side of the road, it was clearly overcome by the proof before the justice to which we have already referred.

It is claimed by defendant that there was no evidence to show that there was anything to obstruct travel on the track except a short pole, which plaintiff had run into the wheel of his wagon, or that defendant had done anything to obstruct travel except the casual laying down of this pole, and that the justice erred in allowing plaintiff to give evidence in relation to the damages sustained by him when he allowed a question as to how much it would be worth "to remove these stone out of his road so as to make a road two rods wide."

*Held*, In considering this objec-

tion we may take into account the fact that the witness answered \$15 to \$25, and also the fact that the justice only rendered judgment for \$2 damages. It therefore inferentially appears he did not follow the opinion of the witness in respect to what it would be worth to remove the stone from the road. If there was technically any error in receiving the opinion of the witness it was not prejudicial to defendant, as the damages given were very slight.

We think the \$2 damages allowed by the justice did not exceed the liability which defendant incurred by his wrongful act.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, JJ.*, concur.

## DURESS. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Betty Schoener et al., *respts.*, v. Marx J. Lissauer et al., *appls.*

Decided April, 1885.

Defendants had an employee arrested for embezzlement and demanded \$2,000 of his relatives, threatening to send him to prison unless it was paid. These threats, in accordance with an understanding with defendants, was communicated to the boy's mother, and she, being overcome by them, executed a mortgage to defendants. *Held*, That the mortgage was void for duress.

The action to set aside the mortgage was not brought until more than six years after it was given. *Held*, That the facts were such that the mortgagor might have brought the action at once, and that it was barred by the statute.

Appeal from judgment in favor

of plaintiffs, entered on decision at Special Term.

Action to set aside a bond and mortgage for \$1,000, executed May 22, 1873, by Babet Marx, plaintiffs' mother, on the ground of duress.

On May 9, 1873, Garson Marx, Babet's son, was arrested in New York on complaint of defendants charged with embezzlement and larceny from defendants of \$50, and they subsequently claimed their loss to be \$4,000 or more.

In interviews with a sister and other relatives of the boy, defendant L. demanded \$2,000, and stated that if it was not paid the boy must go to state prison, and entered into an understanding that his statements should be repeated to the boy's mother, and she, moved by the threats, executed the bond and mortgage, certificate and affidavit. Defendants took these and \$1,000 in cash, and the boy was allowed to go on his own recognizance by the Oyer and Terminer.

*Julius Lipman*, for applts.

*Louis Marshall*, for respts.

*Held*, That the case was within the authorities condemning the mortgage for undue influence, duress *per minas* and fraud. 26 N. Y., 9; 30 Hun, 239; 83 N. Y., 251. Babet Marx was the mother of Garson, who was charged with crime, and she was nervous and feeble in health, mind and purpose, and was overcome by the threats, declarations and acts of defendants communicated to her by an understanding entered into in that regard with L., one of the defendants, and she yielded her will and executed the papers while in terror

and fear. Such circumstances warranted the finding by the trial judge of the invalidity of the papers. 131 Mass., 51.

*Smith v. Rowley*, 66 Barb., 502, distinguished.

*Moritz Marx* testified to his interview with L. and to his threats, and in answer to a question whether L. or his attorney told him to repeat them to Babet, he answered: "that was the understanding." He was then asked if he did tell Babet Marx what took place in New York. Defendants' counsel objected, on the ground that "He does not seem to have been delegated or authorized to repeat." This was overruled and witness allowed to answer that he told her what they said.

*Held*, No error; that the ground of objection was not sound, and that no other objection can be taken now. 70 N. Y., 34; 81 id., 245.

This action was not brought until September, 1879, after the death of Babet. The answer set up the statute of limitations, saying that defendants are "not guilty of the supposed grievances alleged in the complaint at any time within six years before the commencement of this action."

*Held*, That the statute of limitations is a defense to this action. In *Meyer v. Griswold*, 3 Sandf., 464, it was held that it was the duty of plaintiff, where his complaint shows the fraud was committed more than six years prior to suit, to aver, in anticipation of a defense, that it was not discovered until within six years. Plaintiffs have not made any such aver-

ment in the complaint, and there is no finding upon that subject favorable to them. Indeed the nature of the case would seem to indicate that the threats and undue influence and duress relied upon to avoid the mortgage and bond were known to plaintiffs' ancestor more than six years prior to her death, and were known to plaintiffs more than six years prior to the bringing of this suit.

We are of opinion that plaintiffs' ancestor on May 22, 1873, might have brought her action to set aside the bond and mortgage for the fraud or duress alleged and found, and that she and some of the plaintiffs then knew all the facts constituting the fraud and duress, and that the right to maintain such an action was barred by § 382, sub. 5, Code Civ. Pro., when this action was brought.

*Fisher v. Mayor*, 67 N. Y., 78, and *In re Ambrose*, 23 Hun, 647, distinguished.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P.J.*; *Follett, J.*, concurs; *Boardman, J.*, not sitting.

#### EJECTMENT. DAMAGES. PLEADING.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

Charles M. De Lisle, admr.,  
*respt.*, v. Hattie M. Hunt et al.,  
*appls.*

Decided May, 1885.

Under the Code, §§ 1496 and 1497, the plaintiff can now include in the damages for withholding real property the rents and

profits, or the value of the use and occupation, and in this respect the old rule is changed.

Where the plaintiff served a complaint demanding only damages for the detention, and plaintiff died, and the suit had been pending several years, during which, as alleged, a large amount of rents and profits had accrued, *held*, that the administrator was entitled to revive the action and serve a supplemental complaint, demanding damages for these accruing rents and profits in addition to the damages for detention.

Appeal from order allowing this action, which was commenced in the name of Harriet S. De Lisle, now dead, to be revived in the name of plaintiff, her administrator, and allowing him to serve an amended or supplemental complaint. Also appeal from an order denying a motion to vacate the first order and to strike out the new matter inserted in the amended or supplemental complaint.

*C. P. Collier*, for *appls.*

*W. S. Cowles*, for *respt.*

*Held*, That the orders were right. Harriet De Lisle had a life interest in the land she sought to recover, alleging, in this action, that she had by fraud been induced to convey it to defendant. She did not in her complaint demand damages for its detention. These damages now include rents and profits. Code, §§ 1496, 1497. The old rule in 57 N. Y., 151, is changed. The administrator succeeds only to the damages for the detention and objection is made to his asking for other damages now. But the action has been pending for some years and it is alleged, and it is probably true, that the rents and profits which have accrued in these

years are large. Mrs. De Lisle, if living, could have filed a supplemental complaint alleging and asking these damages. Code, § 544. Such claim would be that of an incident to the principal subject matter. Had Mrs. De Lisle's estate expired during her lifetime, and pending suit, she might have been permitted to recover damages for the detention up to the time her title expired. Code, § 1522. And if the damages accrued pending suit she would no doubt have been allowed to set them forth in a supplemental complaint. The administrator succeeds to these damages and we think should succeed to the remedies by which he can enforce them. Therefore the first order is affirmed. Whether under the new complaint he has stated more than has survived to him we need not examine, as the court on the trial will limit his recovery to his rights. Hence the second order is affirmed.

Opinion by *Landon, J.*; *Learned P. J.*, and *Bockes, J.*, concur.

#### CONVERSION. PLEADING. EVIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. THIRD DEPT.

*Bertha Klinger, respt., v. Michael Bondy et al. appls.*

Decided May, 1885.

In an action for conversion the complaint alleged title and the right to possession. The answer was a general denial and title in K. Bros., but without connecting defendants in any way with such third persons. *Held*, That, under these pleadings,

evidence could not be given by defendant to show that he was a creditor of K. Bros., who had attached the property in question and sold it under a judgment in that action; also that defendant could not show that a judgment against K. Bros. under which plaintiff claimed title was fraudulent, and the proceedings, therefore, irregular.

This action was against a sheriff (defendants are his indemnitors who have been substituted) for the conversion of some cases of leaf tobacco. The answer was a general denial first, and then followed this: "as a separate defence, defendants aver, on information and belief, that at the time mentioned in the complaint Charles Klinger and Samuel Klinger were the owners of the tobacco and that it is the same tobacco mentioned in the complaint." It appeared that plaintiff recovered a judgment against her brothers Charles and Samuel. The sheriff thereafter sold on execution this property to plaintiff. Soon after the defendant Bondy began an action against the Klingers, and an attachment was granted and levied on this tobacco. Plaintiff claimed it and defendants here indemnified the sheriff. Bondy recovered judgment; the property was then sold. This action is for that act. After plaintiff had rested, defendant offered to prove the proceedings in the attachment action; also that plaintiff's judgment was fraudulent and irregular. This offer was excluded. Plaintiff had a verdict.

*J. J. Frank*, for appls.

*Z. S. Westbrook*, for respt.

*Held*, That the evidence was in-

admissible under the answer. The complaint alleged title and the right of possession. The answer was a general denial and title in the Klinger Brothers. Since the case showed that the original title was in the Klinger Brothers, and that the same passed to plaintiff by judicial sale, the ruling made was proper unless it appeared by the answer that defendants were in a position whereby the fraud complained of could injure them. The answer did not show this, and it should have done so if there were facts to base it on. An answer of title in a stranger without an allegation connecting the defendant with such title is no defence. 71 N. Y., 36.

It is said by defendant that plaintiff has precluded herself from making the objections she did on the trial. It seems that in order to show how defendants came into the case, plaintiff read the petition and order substituting defendants for the sheriff. The petition recited the attachment, judgment, execution and seizure of the property. It is said that plaintiff has thus put in evidence these facts (which the answer did not show) and that defendants are entitled to use them generally. We think, however, that if the defendants intended to use this defence they should have notified plaintiff. She might then have either prepared herself to meet it or not have read the petition. The defendants did not ask to amend their answer.

Judgment affirmed.

Opinion by *Landon, J.*; *Bockes, J.*, concurs; *Learned, P. J.*, dissents.

## DISTRICT COURTS. PRACTICE.

### N. Y. COMMON PLEAS. GENERAL TERM.

Adolph Adler et al., *appls.*, v. Peter Kerner, *respt.*

Decided March 2, 1885.

In an action on contract in the District Court of New York City an order of arrest was obtained on extrinsic facts. Defendant appeared and admitted the claim, interposing no sworn answer to the verified complaint. Plaintiff's motion for judgment was denied and an adjournment allowed defendant to enable him to vacate the order of arrest, which motion to vacate was granted and judgment in plaintiff's favor entered within eight days from the return day. *Held*, on appeal by plaintiff, no error.

Appeal by plaintiff from judgment of the District Court of New York City, and from order vacating order of arrest.

The action was on contract and an order of arrest was obtained on extraneous facts. On the return day, April 5, 1884, defendant appeared and admitted plaintiff's claim. He interposed no sworn answer to the verified complaint. Plaintiff's motion for judgment was then denied, and an exception taken. Defendant's attorney moved for an adjournment to enable him to vacate the order of arrest, which motion was granted under plaintiff's objection and exception. The motion was thereafter argued on April 8, 1884, the adjourned day, and the decision was reserved. Subsequently, and on April 12, 1884, the motion was granted, and the arrest vacated and a judgment entered in plaintiff's favor for the amount of the



claim. Plaintiff contended that for want of a written answer he was entitled to judgment on the return day.

*A. H. Berrick*, for applts.

*F. H. Rodenburgh*, for respt.

*Held*, After a consideration of §§ 1346, 1383, of the Consolidation Act, that under § 1362 of said act the justice had a right to adjourn the hearing for a period not exceeding eight days, unless the defendant under arrest objected.

The intention of the statute in allowing a judgment on a verified complaint for want of an answer is to dispense with further proof of plaintiff's claim. There is nothing to show that in such a case the court loses jurisdiction of an action in which both parties have appeared.

In *Ahrens v. Burke*, 63 How., 50, no question of arrest was involved, and the authority therein prescribed should not be enlarged.

Judgment affirmed.

Opinion by *Larremore, J.*; *Allen, J.*, concurs.

#### SHERIFFS. INDEMNITY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Joseph J. O'Donohue et al.,  
*respts.*, v. Zachariah E. Simmons,  
*applt.*

Decided May 8, 1885.

In an action on a bond of indemnity whereby the sheriff was indemnified from any damages which might accrue to him for levying under an execution upon personal property which he might judge belonged to the judgment debtor, the court was re-

quested to charge that if neither the sheriff nor any of his deputies judged the property taken under the execution, in reference to which the indemnity applied, was owned by the judgment debtor, then defendant was entitled to a verdict. The court refused so to charge. *Held*, Error, notwithstanding the fact that there was no evidence that the person making the levy did not judge the property levied upon to be owned by the judgment debtor. That the mere act of levying is no evidence that the property levied upon was judged by the person making the levy to belong to the judgment debtor.

Appeal from judgment recovered on verdict.

This action was brought by plaintiff upon a bond of indemnity executed by defendant and one P., deceased, to plaintiff's assignor, then sheriff of the city and county of New York.

The bond was in the usual form and provided for protection to the sheriff and all persons assisting him from any damages that might accrue to him or them for levying, attaching and making sale under and by virtue of the execution of all or any personal property which he or they should or might judge belonged to the judgment debtor. On the trial defendant's counsel requested the court to charge that, if neither the sheriff nor any of his deputies judged the property taken under the execution in reference to which the indemnity applied was owned by the judgment debtor, then defendant was entitled to a verdict. The court refused so to charge and defendant excepted.

*A. M. Whitehead*, for applt.

*James M. Smith*, for respts.

*Held*, Error. That defendant would not be responsible if property

had been taken by the sheriff which neither he nor his deputies judged to be the property of the judgment debtor. 83 N. Y., 525; 18 Hun, 423.

That it is no answer to this proposition that there was no conflicting evidence on the subject of the levy. That except from the mere act of levying there was no evidence that the property was judged to belong to the judgment debtor by the persons who made the levy, and that the mere fact of levy was not to be construed, when an issue is created in regard to it, as the exercise of judgment or an act in conformity to the bond.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

*Davis, P.J.*, dissents upon the ground that the official act of levying upon property under the execution, was sufficient *prima facie* evidence that the officer judged it to belong to the defendant in the execution and that there was nothing in the case rebutting or impairing this *prima facie* evidence, and therefore no occasion to make the charge requested, and it was not therefore error to decline to charge at all on that question.

#### CANALS. WATER-PRIVILEGES.

##### N. Y. COURT OF APPEALS.

Dermott, exr., et al., *appls.*, v. The State, *respt.*

Decided April 14, 1885.

The grant to plaintiffs of a right to draw water from the canal for milling purposes

under Chap. 270, Laws of 1822, and Ch. 100, Laws of 1827, was a limited estate liable to be defeated by the happening of the contingency provided as a condition subsequent. The contingency having occurred and the commissioners having duly exercised their right of revocation plaintiffs had no claim for damages against the state.

The claimants in this proceeding seek to recover damages by reason of the act of the Canal Commissioners in cutting off the privilege of drawing surplus water from the Erie Canal for the propulsion of the machinery used in running certain flouring mills owned by them. They base their claim on rights acquired under Ch. 270, Laws of 1822 and Ch. 100, Laws of 1827, the first of which recites, that as the canal commissioners, by operations determined on for the improvement of the navigation of the Hudson River, will destroy and render entirely useless the claimants, mill site and dam, and as it appears to the legislature that the owners should be compensated, said commissioners were authorized to grant and convey to them the right of drawing water from the canal sufficient to propel four run of millstone for grinding flour, providing such privilege shall not operate to prevent or injure the navigation of the boats therein, and that it shall be lawful for the canal commissioners or a majority of them from time to time to modify or in whole revoke, any grant in pursuance of said act as may seem necessary and proper for the preservation of the navigation of the canal. The act of 1827 confirmed the power given by the

act of 1822 with some immaterial changes. The claimants' grantors erected valuable mills in 1828 under the authority of said acts, and continued to use and enjoy them by themselves and their grantees by water power until 1875, when they were deprived thereof by a resolution of the canal commissioners, adopted in 1875, which recited, that the water drawn from the canal by claimants under said "water grant is required by the State for canal purposes in order to protect and preserve the navigation of the said canal," and therefore said grant is hereby "rescinded, revoked, annulled and entirely abrogated." The claimants filed their claim with the board of canal appraisers in 1875, and it was pending before that body until 1883, when it was transferred to the board of claims. On motion of the Attorney General the petition was dismissed on the ground that "the facts stated in the claims and exhibits under the laws of this State do not constitute any claim against the State."

*Martin I. Townsend*, for appls.

*D. O'Brien*, Atty. Gen., for resp't.

*Held*, That the petition was properly dismissed; that the grant was a limited estate liable to be defeated by the happening of the contingency provided as a condition subsequent; that such contingency has occurred and the right of revocation has been duly exercised and all rights under the grant have been effectually destroyed; that the motion to dismiss the claimants' petition was in the

nature of a demurrer to the cause of action stated, and impliedly admitted for all the purposes of this proceeding the truth of the allegations contained therein.

The petition alleged that the tide never flowed in that portion of the river where the mill privilege was situated and that it was not navigable for any purpose at the time of the grant; that subsequent to the grant the capacity of the canal had been greatly enlarged without the consent of the claimants and that such enlargement rendered necessary the appropriation of the water made by the canal commissioners in 1875.

*Held*, That even if said river had been navigable that fact alone would not preclude the lawful acquisition by claimants of a mill site and dam thereon or rebut the presumption of ownership arising from the admission of that fact made by the State in the recitals of the Act of 1822; that it was competent for the State to grant and the claimants to acquire the right to erect a dam on said river and to possess the same as their individual property. The act of 1822 could not be considered a mere voluntary exercise of the bounty of the State towards the persons named in it, but must be regarded as a valid contract between the parties and subject to the same rules and interpretation which govern the contracts of individuals, except those requiring the grants of the sovereign to be strictly construed against its grantees, and such as necessarily arise from the difference of contention ascribable to parties whose

objects and employment are so diverse as those of sovereign and subject. 2 Hill, 620; 14 Johns., 255; 11 Peters, 420; 93 N. Y., 641.

When a grant by a sovereign to a subject relates to what are known as *jus publici* or the rights which the sovereign holds in trust for the public use, such as the supervision of public highways and the control of navigable waters, the grant although for a valuable consideration will be construed strictly against the grantee. 93 N. Y., 641; 6 id., 546; 92 id., 477.

*Also held*, That the parties contracted with reference to the necessities of navigation only and whenever for any reason those necessities required it the grant reverted to the State. 2 Hill, 418.

Judgment entered on decision of Board of Claims, dismissing complaint, affirmed.

Opinion by *Ruger*, *Ch. J.* All concur.

TENANT BY CURTESY.  
SUMMARY PROCEEDINGS.  
N. Y. COMMON PLEAS. GENERAL  
TERM.

John Mack, *respt.*, v. Adele Roch, *applt.*

Decided March 13, 1885.

The married women's acts of 1848, *et seq.*, have not abolished tenancy by curtesy.

Summary proceedings to dispossess a tenant may be brought by the husband as tenant by the curtesy of premises let by his deceased wife.

Appeal from judgment of a District Court of New York City, dispossessing appellant from certain premises for non-payment of rent.

The premises were held by the

tenant under a lease executed by one Mrs. Mack in her lifetime, who died shortly afterwards, and this proceeding was brought by the respondent, who was her husband, as tenant by curtesy.

Appellant contended that the proceeding could not be maintained by a tenant by curtesy, and that tenancy by curtesy was abolished by the married women's acts of 1848, *et seq.*

*E. Benneville*, for applt.

*Boardman & Boardman*, for respt.

*Held*, That said acts have not affected the common law rights of the husband as tenant by curtesy. 47 N. Y., 351; 54 id., 280; 2 Lans., 21; 21 Hun, 381; 52 Barb., 412; 2 Robt., 307. Tenancy by curtesy is not a mere charge or incumbrance. It is a legal estate in the land. 3 Hill, 182. Upon the death of his wife Mr. Mack became entitled to the possession of the premises in question during the period of his natural life, and to the administration and enjoyment of them. The proceeding was properly brought by the tenant by curtesy.

Judgment affirmed with costs.

Opinion by *Allen, J.*; *Larremore, J.*, concurs.

TAXES. CORPORATIONS.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. The Knickerbocker Ice Co., *applt.*

Decided May 8, 1885.

A corporation organized for the purposes of "collecting, storing and preserving ice,

of preparing it for sale, of transporting it to the city of Nork York, or elsewhere, and of vending the same," is not a manufacturing corporation within the meaning of Chap. 542, Laws of 1880, as amended by Chap. 361, Laws of 1881.

Affirming S. C., 19 W. Dig., 194.

This action was brought to recover State taxes for the year ending November 1, 1882, under § 3 of Chap. 582, Laws of 1880, as amended by Chap. 361, Laws of 1881, and also for the penalty prescribed for their non-payment. The answer set up that defendant "is a manufacturing corporation, carrying on a manufacturing business in this State," and exempt from such imposition by the terms of the statute. It appeared that defendant was organized under the general manufacturing act, Laws of 1848, Ch. 40, and an act to extend the operation thereof, Laws of 1855, Ch. 301; that its business was collecting ice, "storing, preserving and preparing it for sale, transporting it to the city of New York, or elsewhere, and vending the same." The referee found that defendant was not a manufacturing corporation.

*Matthew Hale*, for applt.

*D. O'Brien*, for respts.

*Held*, No error. 86 N. Y., 409.

Chapter 301 of the Laws of 1855, under which defendant was incorporated, extended the manufacturing act of 1848 (Chap. 40), so as to permit the formation of such a company. It became a law April 12, 1855, and defendant was incorporated April 19, 1855. Its object follows literally the language of the Act of 1855.

*Held*, That this was both a prac-  
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tical and legislative interpretation of the Act of 1848; that the Act of 1855 may be regarded as a legislative declaration that the object to which it was directed was not included in the Act of 1848.

*Also held*, That the provision in the Act of 1855, that a corporation organized under it shall be entitled to the privileges conferred by the Act of 1848, does not imply a legislative intent to put it on the same footing in all respects as a manufacturing corporation. Exemption from taxation is limited by the Act of 1881 to corporations which are in fact manufacturing corporations and do carry on manufacture.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

*Mary Shaw, admrx., v. Charles L. Sheldon et al.*

Decided June, 1885.

The risk of injury from a defect in dangerous machinery, which defect adds to the danger and is negligently permitted by the employer to exist, is not such a risk as the servant is presumed to have assumed when he took the employment.

Motion by defendants for new trial on exceptions taken at Circuit and ordered to be heard at General Term in first instance.

Action under the statute to recover damages resulting from the death of plaintiff's intestate, alleg-

ed to have been caused by defendant's negligence.

Deceased was employed as a roller in defendant's rolling mill, where heated bars of iron were pressed between heavy rollers of corrugated iron. To prevent the rollers from becoming injuriously heated, they were supplied with water conveyed in a trough hung above the rollers. When revolving the rollers were dangerous in case any employee came in contact with them. There is testimony tending to show that it was usual in most rolling mills to cover the couplings of the rollers with wood or metal. When deceased first entered defendants' employ a wooden cover had been provided for the couplings, which was afterward destroyed, and for some time before his death the couplings remained uncovered, with the exception of a partial protection consisting of an iron tub or "bosh" placed in front of the coupling, which did not serve the purpose of a complete covering. One night while deceased was at work he was told by a co-employee that the water was not running from the trough to the rollers. The trough being higher than his head, deceased stepped upon the "bosh" and looked into the trough. While so standing his foot slipped, or his clothing was caught by the suction of the revolving couplings, and he came in contact with the rollers and received injuries from which he died. It was common for the flow of water from the trough to be interrupted, and for one or other of the employees to step upon

a "bosh" to look into the trough for the cause of the stoppage, without the rolls being stopped. So often had this occurred that the top of the "bosh" had been worn smooth by the hobnailed shoes of the men. Deceased might have looked into the trough by passing around the machinery, going to the rear of the rolls, and stepping upon a plate projecting from the machine. Any employee who happened to be in a situation to look, or who was not otherwise employed, considered it his duty to examine whenever the water stopped.

*R. C. Steel*, for defts.

*Louis Marshall*, for plff.

*Held*, That there was testimony warranting the jury in finding defendants negligent.

It cannot be said, as matter of law, that deceased assumed the risk of danger from the machinery growing out of defendants' neglect to furnish suitable protection. 49 N. Y., 521; 40 Mich., 420; 6 H. & N., 349; S. C. on appeal, 7 id., 937; 100 U. S., 213; 8 Allen, 441; 60 N. Y., 607; 73 id., 585; 102 Mass., 572; 33 Hun, 188; 89 N. Y., 375; 73 id., 40; 82 id., 370; 95 id., 552.

*Gibson v. Erie R. Co.*, 63 N. Y., 449, and *De Forest v. Jewett*, 88 id., 268, distinguished.

As to the question of contributory negligence, there was room for different inferences and conclusions, and the question was properly left to the jury.

New trial denied and judgment ordered for plaintiff on verdict.

Opinion by *Smith, P.J.*; *Barker* and *Bradley, JJ.*, concur; *Haight, J.*, not voting.

**FORCIBLE ENTRY.**

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Isaac R. Pharis, *respt.*, v. R. Nelson Gere, *applt.*

Decided April, 1885.

A mere threat or declaration of intention to take possession of real property is not sufficient upon which to base a finding of a detention and damages by reason thereof.

Appeal from judgment in favor of plaintiff and from order denying motion for a new trial on the minutes.

Action to recover damages for forcible entry and detainer by defendant of salt blocks Nos. 22 and 23 in Geddes. Defendant sought to justify his acts as an agent of the Syracuse Fine Salt Co., under a lease to said company of an undivided half of said premises executed by plaintiff, and also under a lease of the other undivided half executed by the committee of plaintiff's brother, who had been adjudged a lunatic. The delivery of the first mentioned lease was claimed to have been conditional. The latter lease was for ten years, and the first six months' rent thereon was paid to the committee. Under it defendant sought to take possession of block 22, and avowed his intention to take possession of block 23, although in fact he never actually obtained possession of block 23.

The court refused a request to charge "that there is no evidence upon which the jury can find any forcible entry by defendant upon salt block 23 or a forcible detainer thereof by him, and if they shall

arrive at the question of damages, no damages can be awarded for said block 23."

*George F. Comstock and S. H. Green*, for *applt.*

*L. Marshall and Goodell & Nottingham*, for *respt.*

*Held*, Error; that defendant was entitled to the charge. The blocks were distinct, though lying adjacent, and it does not satisfactorily appear that defendant entered upon or detained block 23 from plaintiff. The threat or remark that he intended so to do was not sufficient to find a detention, or damages by reason of such supposed detention.

The court also refused to charge "that if the entry was peaceably made under the license and by permission of Charles E. Pharis by his committee, such entry was lawful." This request was confined to block 22.

*Held*, If we assume that the committee by their lease, or by accepting rent, or by verbal consent gave authority and license to defendant's company to enter upon the premises, then defendant did not wrongfully enter; nor could his detention be said to be wrongful until the license and authority were properly revoked. Plaintiff had no power to make such a revocation. The committee did not undertake to revoke the license or authority given to defendant's company. However, the trial court expressly took from the jury the right to find an entry or detention under such license or authority so emanating from the committee. But as we do not find it

needful to pass conclusively upon that branch of the case, we forbear further comment.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P.J.*; *Boardman* and *Follett, J.J.*, concur.

### TAXATION. EXEMPTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. The Swiss Benevolent Society, v. The Commissioners of Taxes.

Decided May 8, 1885.

The premises No. 108 Second avenue, in the City of New York, belonging to the Swiss Benevolent Society, a corporation incorporated for the purpose of affording pecuniary and other relief to such persons, natives of Switzerland or of Swiss origin, as may be in the U. S. and in need of assistance, and used to give a temporary home, asylum, and relief to the sick, necessitous and others who may be proper objects of its bounty in accordance with its charter, is an "almshouse" within the meaning of sub. 4 of § 4, 1 R. S., 388, and as such is exempt from taxation.

*Certiorari* to review an assessment of relator's property made by respondents.

The property assessed was premises in the City of New York, known as No. 108 Second avenue, belonging to the relator, a corporation incorporated for the "purpose of affording pecuniary and other relief to such persons, natives of Switzerland or of Swiss origin, as may be in the U. S. and in need of assistance," Chap. 170, Laws of 1851, and it was used by relator "to give a temporary home, asylum, and relief to the sick, necessitous

and others who may be proper objects of its bounty in accordance with its charter." It was therefore claimed by relator that this property was an almshouse within the meaning of sub. 4 of § 4, 1 R. S., 388, and was exempt from taxation by force of said statute. It was claimed by respondents, however, that the word "almshouse" as used in the statute included only such almshouses as were the property of the public, and were used and controlled by public authorities as the receptacles of public paupers in accordance with the general system of the poor laws of the state, and that relator's property was not therefore exempted from taxation by this statute.

*F. R. Coudert*, for relator.

*E. Henry Lacombe*, for respts.

*Held*, That in its general signification the word "almshouse" undoubtedly includes such an institution or establishment as that owned and maintained by relator.

That by 1 R. S., 631, § 32, almshouses provided by cities, towns or counties, were specifically exempted from taxation, and that sub. 4 of § 4, 1 R. S., 388, was therefore quite superfluous for that purpose, and it must therefore be presumed that the legislature in enacting the latter statute had in contemplation that there might be other "almshouses" not provided by any city, county or town, and which ought also to be exempted from taxation.

That the reason of the case is altogether in favor of the exemption, because a corporation incor-



porated for a purpose like that for which relator was created is an agency of the State, for a purpose public in its nature, although its incorporators are private persons, and the State by taxing such an almshouse is taxing so much of its own duty toward the poor who find aid and support therein. 13 N. Y., 230.

That the almshouse of the relator is fairly within the exemption of the statute relied on.

Judgment to the relator.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

### JURORS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People, *respts.*, v. Tyrrell, *applt.*

Decided May, 1885.

Where a juror testified that he had a strong impression as to the guilt or innocence of the prisoner and that evidence would have to remove such impression before he could give a candid opinion, and that he had no *special* doubt that he could give an impartial verdict upon the evidence, *Held*, That it was error to overrule the challenge.

Where such error causes the prisoner to exhaust his peremptory challenges it is sufficient to authorize the granting of a new trial.

One of the jurors visited the home of defendant, examined the premises and had some conversation with defendant. *Held*, Misconduct for which a new trial should be granted.

Appeal from judgment convicting defendant of keeping a disorderly house.

On the trial one P., called as a juror, was challenged and testified that he had a strong impression. Q. You don't think it amounts to

a positive opinion? A. No, sir.

Q. Then you would require testimony to be introduced to disabuse your mind of that impression?

A. Yes; I think I could try the case on the evidence produced here, but still that impression would be in my mind; that impression would govern me to some extent but evidence would have to remove that impression before I could give a candid opinion. Q.

Would or would not that impression govern your deliberation on the testimony in the case? A.

That impression would have to be removed and to that extent it would govern it. The court then asked him, "Could you, notwithstanding any opinion you have formed or impression you have about this case, if you were summoned as a juror, hear the evidence and render an impartial verdict upon that evidence and nothing else?" A. I think I could. Q. Have you any doubt about it? No; no special doubt.

The court then overruled the challenge and defendant challenged peremptorily.

*Jere. Weinberg*, for *applt.*

*James Ridgway*, for *respts.*

*Held*, That the disallowance of the challenge was erroneous. 96 N. Y., 115. That under this testimony defendant would be required to introduce evidence to remove the strong impression of this juror before his verdict could be secured. In other words it would be necessary for defendant to show his innocence before he could obtain an acquittal. That would reverse the humane and salutary rule of our

law which presumes the innocence of all men and requires proof of guilt before conviction. That all that the last answer meant was that the juror had no special or specific doubt, but as he had a general impression respecting the merits of the case there was a general doubt about his ability to put that aside and render a verdict on the evidence.

The People insist that a new trial cannot be granted for an error committed on the trial of a challenge to a juror who did not participate in the verdict.

*Held*, Untenable. When the Casey case was before the General Term, 31 Hun, 158, that was then supposed to be the rule, and as none of the jurors challenged in that case participated in the verdict it was supposed no error had been committed. But the Court of Appeals held otherwise, and decided that because the peremptory challenges were exhausted defendant might have been harmed because his rights were abridged. 96 N. Y., 115. The same state of facts exist here and we follow the court of last resort.

Our conclusion is also that a new trial should have been granted by reason of the misconduct of the juror Parker. It is the object of our benign system of jurisprudence to obtain impartial, fair-minded men for jurors, and no view can be taken of the testimony respecting the visit of the juror to the house of defendant that does not prove him guilty of great misconduct. He took in testimony on a view of the premises

in a clandestine manner and had some conversation with defendant at the same time. This was much against the orderly administration of justice and cannot be passed over in silence by the courts. Neither is it an answer for the public prosecutor to say that defendant should have exposed the transaction during the trial. That does not eradicate the vice from the conduct of the juror nor show that the substantial rights of defendant have not been prejudiced.

Conviction reversed and new trial granted.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

#### N. Y. CITY. CLERKS' SALARIES.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Graham McAdam v. The Mayor, etc., of N. Y.*

Decided May 8, 1885.

Plaintiff, who was the chief clerk of the Bureau of City Revenue in the Finance Department of the City of N. Y., was appointed by the Board of Education of said city instructor in the evening high school in economics and political science, with special reference to the duty of citizenship in N. Y. City. *Held*, That he he was prevented by § 59 of the Consolidation Act of 1882 from collecting payment from the city for the services performed as such instructor.

Controversy submitted without action.

Plaintiff, who was the chief clerk of the Bureau of City Revenue in the Finance Department of the City of N. Y., was appointed by the Board of Education of said

city instructor in the evening high school in economics and political science, with special reference to the duty of citizenship in N. Y. City. The payment for his services, if payment had been made, would have been made out of the moneys in the city treasury, and defendants refused to make such payment, claiming that they were precluded from so doing by § 59 of the Consolidation Act of 1882 prohibiting any member of the Common Council, head of department, chief of bureau, deputy thereof or clerk therein, or other officer of the corporation, from being or becoming, directly or indirectly, interested in the performance of any contract, work or business, or the sale of any article, the expense, price, or consideration of which is payable from the city treasury.

*Everett P. Wheeler*, for plff.

*David J. Dean*, for defts.

*Held*, That while perhaps it might be said that the legislature never contemplated excluding payment for services such as were rendered by plaintiff herein, though connected with one of the bureaus, still the language of § 59 is very broad, and indicates a determination on the part of the legislature to prevent any person from receiving compensation from the city in two modes or by two methods, thus preventing by any possibility the use of official position for personal aggrandizement by interest in any contract other than that which exists directly between the official and the city for the service to be rendered by him directly to it; and that, since plain-

tiff was a clerk of a bureau, and was directly interested in the work for which he sought to recover, namely, the delivery of lectures in the evening high school, he was precluded by the statute, *supra*, from enforcing his demand. 3 Hun, 664; 33 N. Y., 29; 67 id., 456; 66 id., 585.

*McDonald v. Mayor*, 68 N. Y., 23, distinguished.

Judgment for defendant.

Opinion by *Brady, J.*; *Davis, P.J.*, and *Daniels, J.*, concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. COMMON PLEAS. GENERAL TERM.

*Merlett, respt.*, v. *The North & East River SS. Co.*, *applt.*

Decided March 13, 1885.

In an action by the employee for wages, where the master pleads as a set-off that the employee misconducted himself in his employment by negligently and carelessly doing a specified thing, thereby exposing the master to liability, such defense cannot be sustained where it appears that an action is pending against the master for his employee's said act in which he has denied his liability therefor, and which action is not yet decided.

Appeal from judgment in favor of plaintiff.

*Tennett*, the assignee of plaintiff, was a pilot and steamboat captain in defendant's employ at monthly wages, and while steering one of defendant's steamboats ran her into a tug boat, which was sunk by the collision. It was afterwards raised, and having been badly injured was sold for a small sum. The tug owners then libelled

defendant's steamboat, and defendant interposed an answer contesting its liability. This action has not yet been tried and there is no adjudication of defendant's liability. Plaintiff, as assignee, brought this action to recover one month's wages due Tennett. Defendant pleaded in answer a general denial, and also, as a set-off, that Tennett had misconducted himself in his employment by negligently and carelessly running the steamboat into the tug, thereby exposing defendant to liability.

*Scudder & Carter*, for applt.

*S. W. Carey*, for respt.

*Held*, That though the steamboat company made its claim by way of answer and asked no affirmative relief, it is the same as if the company had brought an action for negligence against Tennett, and if an action of that kind were brought at this stage the company could only recover nominal damages.

The true rule is that the company will have no claim against Tennett until it has actually paid, or at least been adjudged liable to pay, damages for his negligence. 4 T. R., 589; 20 Wis., 408; Thompson on Negligence, 1061.

Judgment affirmed.

Opinion by *Van Hoesen, J.*; *Daly, Ch. J.*, concurs.

#### CHATTEL MORTGAGE.

##### N. Y. COURT OF APPEALS.

Potts, admr., *respt.*, v. Hart et al., *appls.*

Decided May 8, 1885.

An understanding or arrangement between the parties to a chattel mortgage that the mortgagor shall be permitted to deal with the property for his own benefit renders the mortgage fraudulent and void as to creditors, whether such arrangement is contained in the mortgage or exists by parol, and whether such parol agreement is valid or not.

Declarations made by the mortgagee's book-keeper at the time of taking the mortgage, to the effect that it would not affect the mortgagor in any way to give it, are competent as part of the *res gesta*.

On January 25, 1875, S., plaintiff's intestate, being indebted to defendants \$3,323.22 upon certain promissory notes falling due between that date and 25th of May following, executed to them a mortgage on all the goods in his store, being such articles as were necessary to conduct his business. The mortgage was filed in the county clerk's office on February 3d. S. died on April 15, and in May plaintiff was appointed administrator of his estate. Thereafter, default having been made in the payment of the notes secured by the mortgage, defendants took from plaintiff's possession so much of the mortgaged property as they could find in the store formerly occupied by S. Plaintiff thereupon commenced this action for the conversion of the goods, which were alleged and admitted to be of the value of \$939.37, claiming that the mortgage was fraudulent and void as to creditors, and asserting his right to avoid it under Chap. 314 of the Laws of 1858. At the time the mortgage was given and at the time of his death S. was insolvent and unable to pay his debts, and other persons be-

sides defendants had claims against him, which at the time of his death were and still remain unpaid. Plaintiff also claimed that the mortgage was void because at the time of its execution there was an understanding that the mortgagor should continue his dealings with and sales of the mortgaged property for his own benefit as before. It was proved that S. had been for some years engaged in the same business, during which time he had dealt with defendants. At the time the mortgage was executed D., defendant's bookkeeper, who seems to have been their agent in procuring the mortgage, stated to S. that it would not affect him in any way to give the mortgage. S. continued, with defendant's knowledge, selling the goods and conducting the business, and before his death had disposed of about two-thirds of the mortgaged property. He continued to buy goods of defendants during the same time to replenish the stock in his store. None of the proceeds of the sale were applied upon defendant's mortgage.

*Arthur Hickman*, for applts.

*Adelbert Moot*, for respt.

*Held*, That from the nature of the transaction and the facts it may be inferred that the mortgage was given with a tacit understanding and arrangement between the parties that the mortgagor should be permitted to deal with the property for his own benefit; that this rendered the mortgage fraudulent and void in relation to creditors. 17 Wend., 492; 6 Hun, 231; 4 N. Y., 584; 19 id., 12 37 id., 591; 72 Vol. 21—No. 21b.

id., 424; 91 id., 214. A mortgage thus given is fraudulent and void as to creditors, because it must be presumed that at least one of its purposes, if not its main purpose, was to cover up the mortgagor's property and thus hinder and delay his other creditors. It matters not whether the agreement that the mortgagor may continue to deal with the property for his own benefit is contained in the mortgage or exists by parol. Whether the parol agreement is valid or not it is equally effectual to show fraud. It is always open to creditors to assail by parol evidence a mortgage or bill of sale fraudulent as to them.

A chattel mortgage would be fraudulent and void as to creditors if an agreement existed between the mortgagor and mortgagee that the former might continue to deal in the mortgaged property for his own benefit so long as the latter consented thereto.

*Also held*, That the declaration of G., defendants' bookkeeper, that it would not affect the mortgagor in any way to give the mortgage, was competent as part of the *res gestæ*.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur.

## APPEAL. PRACTICE.

N. Y. COURT OF APPEALS.

Lyddy, exr., *applt.*, v. Chamberlain, *respt.*

Decided April 14, 1885.

On appeal from a judgment in an action for services in negotiating railroad securities it appeared that the evidence as to the value of the services would not warrant the finding as to their value, and that no proof of their precise nature and extent was given. The General Term so found, but fixed the value at a lower sum and ordered judgment therefor. *Held*, that the General Term thereby exceeded its power.

This action was brought to recover for services in negotiating certain railroad securities. The referee found, among other things, and the appellate court conceded, that there were services rendered by A., plaintiff's testator, in the sale of certain of the securities. The referee fixed the value of these services at \$10,500. There was no evidence as to the value of these services which would warrant such a finding, and no proof of their precise nature or extent was given. The General Term so found, but instead of reversing the judgment and ordering a new trial, it fixed the value of such services at \$3,500, and judgment for that amount was entered in favor of plaintiff against defendant.

*Robert Sewell*, for applt.

*Francis N. Bangs*, for respt.

*Held*, Error; that the General Term exceeded its power, and exchanged the duty of an appellate tribunal for that of a trial court, 69 N. Y., 462; that plaintiff's recovery could only be, if at all, upon a *quantum meruit*.

Judgment of General Term, modifying judgment for plaintiff, modified, and as to \$3,500 thereof reversed, and new trial granted.

Opinion by *Finch, J.* All concur.

## PROHIBITION. SURROGATES. RESIDENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. SECOND DEPT.

The People ex rel. James, *applt.*,  
v. The Surrogate of Putnam Co.,  
*respt.*

Decided May, 1885.

A writ of prohibition should not be granted to restrain a surrogate from taking proof of a will where the petition for proof stated the necessary facts to confer jurisdiction, but objection was thereafter made that decedent was a resident of another county. The presentation of the petition gave the surrogate jurisdiction of the subject matter, and the objection raised an issue which the surrogate had power to determine as incident to the subject matter, and his decision if erroneous could be reviewed on appeal, but not assailed collaterally.

Where a person has two residences at different seasons of the year, that will be deemed his domicil which he himself elects or describes as his home, or where he votes or exercises the rights and duties of a citizen.

Appeal from order denying motion to make absolute a writ of prohibition.

A petition was filed with defendant for proof of the will of one J., deceased, which contained an allegation that he was a resident of Cold Spring Putnam Co. at the time of his death. Relator appeared on the return day of the citation and objected to probate on the ground that decedent at the time of his death was a resident of the city and county of New York, and claimed that defendant had no jurisdiction in the premises, and offered to prove the facts if they were disputed. Proof was introduced respecting such residence,

and after the testimony was closed and counsel had summed up, and before the surrogate rendered any decision on the subject, an alternative writ of prohibition was served on him, commanding him to desist and refrain from taking proof of the will until the further order of the court.

It was claimed that decedent had two residences, one in Putnam county in the summer, and one in New York in the winter. It appeared that decedent died at his house in New York, where he had been living for several months previous; that he had declared in his will and in several deeds that his home and domicile were in Putnam county, and had declared in conversation that he resided there, that his home was there, that he voted there and paid his taxes there. He was a special road commissioner for that county, and ran there for the office of member of assembly.

A motion to make the writ absolute was denied.

*E. H. Berm*, for applt.

*Haliburton Fales*, for respt.

*Held*, No error; that the writ of prohibition was not the appropriate remedy in this case and was properly denied. It is an extraordinary remedy, and the writ is only allowed in extreme cases in the sound judicial discretion of the courts. 89 N. Y., 155. It will not be allowed where the inferior court has jurisdiction of the subject matter. In the language of Chief Baron Comyn, "Where it has cognizance of the principal it shall determine that which is inci-

dent." Comyn Dig., Tit. Prohibition. If in such a case error intervenes the remedy is by appeal. 7 Wend., 518.

Although the jurisdiction of the surrogate is limited, his power to take proof of wills and admit them to probate is undeniable and he is vested with full power over that subject. He has power to act, and if he proceed erroneously his action may be reviewed by appeal, but may not be assailed. "He may commit an error as to inhabitancy which would be sufficient to reverse his decision, but not sufficient to render it void from the beginning, for the reason that he had power to act upon the subject." 76 N. Y., 321.

When the petition for proof of the will of J., containing an averment of his death and that he was at the time of his decease a resident of Putnam county, was presented to the surrogate of that county he was in possession of the case and had jurisdiction to proceed therein, Code Civ. Pro., § 2472, sub. 1; § 2476, sub. 1; and when the objection was made that decedent was not at the time of his death a resident of Putnam county that raised an issue against the petition which it became necessary to determine. But how was the fact to be ascertained? Not by an abandonment of the case, certainly, but by proceeding to hear the proof and decide the question, which the surrogate was bound to do. It was a special fact on which depended the right of the surrogate to act in this particular case, which it was his duty to

ascertain, and then if his decision was erroneous it could be corrected on appeal, but could not be assailed by any collateral proceeding. 31 Barb., 66; 1 Seld., 511. Preliminary proof of all the facts on which the jurisdiction of a surrogate depends is not required. 1 Seld., 511.

*Also held,* That on the merits the decision is correct. Residence has much the same signification as domicil, and means the place where a person lives and has his fixed, permanent home and principal establishment; and where a person has two residences at different seasons of the year that will be deemed his domicil or home which he himself elects or describes as his home, or where he votes or exercises the rights and duties of a citizen. Burrill L. Dict., Tit. Domicil. Residence combined with intention constitutes a domicil, and the fact depends much on the intention of the party. 2 Kent Com., 431. Under these rules the facts before us are potent to establish the unequivocal intention of decedent to make and continue his home at Cold Spring, and there is nothing to manifest any change or revocation of such intention.

Another reason for the denial of the writ of prohibition in this case is that relator had a complete and adequate remedy by appeal from the decision of the surrogate, on which the whole question could be reviewed.

Order affirmed, with costs.

Opinion by *Dykman, J.; Barnard, P.J., and Pratt, J.,* concur.

## MORTGAGE. NURSERIES.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John D. Hamilton, *respt.*, v. William Austin et al., *appls.*

Decided April, 1885.

It is not waste for a tenant of nursery grounds, entering subsequent to a mortgage, to remove and sell in good faith and in the usual course of business growing nursery stock, if done before foreclosure is begun and not in apprehension of foreclosure and for the purpose of injuring the freehold and security.

Neither the receiver appointed in foreclosure, nor the mortgagee in a subsequent action at law, can recover such stock or its value.

Appeal from judgment in favor of plaintiff, entered on the report of a referee.

Action to recover damages for removing and selling nursery stock from mortgaged premises between May 1, 1881, and May 10, 1882, to the injury of plaintiff's security as mortgagee.

Nov. 6, 1876, one C. purchased premises which he had occupied as a nursery and gave the bond and mortgage in question in part payment of the purchase price; neither bond nor mortgage refers to the nursery stock. Feb. 7, 1877, plaintiff purchased the bond and mortgage, relying on the statement of C. that the mortgage covered the nursery stock; that he intended to continue the business, and that the security was good. The mortgage was recorded Nov. 8, 1876, and the assignment to plaintiff Feb. 7, 1877.

C. continued the nursery business as before until Jan. 1, 1879,



when he sold a half interest in the stock and business to defendant Austin, they becoming equal partners and the firm taking a lease of the land. The firm continued the business until April 29, 1881, when C. assigned his interest in the business to defendant Chapman, who entered into the partnership, and the business was continued by the new firm until April 10, 1882. Both Austin and Chapman when they purchased knew of plaintiff's mortgage, but neither knew that he purchased it upon the mortgagor's statement that it was a lien on the nursery stock. During all this time said persons were engaged in rearing and selling trees according to the custom of nurserymen, to the knowledge of plaintiff and his assignor, without objection until Dec. 2, 1881, as stated below.

An action to foreclose the mortgage was begun Nov. 17, 1881, to which these defendants were made parties, and under the decree therein the premises were sold April 10, 1882, leaving a deficiency of \$1,812.90. Dec. 2, 1881, an order was obtained in that action restraining these defendants from removing trees, shrubbery or fixtures from the premises, which order was modified March 30, 1882, so as to allow them to remove so much of the stock as had been placed on the premises since Jan. 1, 1879.

The referee found that between May 1, 1881, and April 10, 1882, defendants removed from the premises trees, plants and shrubs of the value of \$2,278 as they stood on the premises before removal;

that the value of such stock which had been planted by the mortgagor prior to Jan. 1, 1879, was \$104; that the value of such stock which had been planted by the firm prior to April 29, 1881, was \$1,758, and that the value of such stock which had been planted by defendants since April 29, 1881, was \$416. He held that such removal was waste, and directed judgment for \$1,812.90, the amount of the deficiency.

Defendants requested a finding that plaintiff was not entitled to recover for trees removed and sold in the usual course of business, which was refused.

*W. G. Tracy*, for applts.

*C. E. Stephens*, for resp't.

*Held*, Error. As between mortgagor and mortgagee trees grown in a nursery expressly for sale as merchandise are covered by the mortgage, and those standing on the land when it is sold under a foreclosure pass with the land to the purchaser. 31 Conn., 598; 7 Barb., 263; 19 Iowa, 309; 47 id., 439; Jones on Mortg., §§ 434, 697. Fixtures placed or emblements grown upon mortgaged premises by a tenant of a mortgagor entering subsequent to a recorded mortgage are covered by it, and the tenant's right to removal is governed by the rules prevailing as between mortgagor and mortgagee, and not by the rules prevailing between landlord and tenant. 12 Allen, 100; 15 Gray, 522; 8 Wend., 584; Jones on Mortg., §§ 439, 697, 776, 780. The rule is the same when the tenants are a firm composed of the mortgagor and a third person. 12 Allen, 100.

Trees reared in nursery grounds expressly for sale as merchandise possess none of the legal characteristics of fixtures. Fixtures are articles which, having an existence independent of a freehold, are afterwards annexed to and become a part of it. The trees in dispute never had an existence independent of the freehold, were not designed for use in connection with it, but were there solely for growth and destined to become a part of other realty. Nursery trees more nearly resemble emblements, though they are not strictly such, emblements being the annual product or fruit of things sown or planted. While the rules for determining the rights to fixtures and emblements, as between mortgagors and mortgagees, are not strictly applicable to the question involved, yet they throw some light upon it. Emblements reared by tenants entering subsequent to a mortgage, if growing at the time of the foreclosure sale, pass to the purchaser. But if the tenant in the usual course of husbandry gathers the emblements before sale or foreclosure they belong to him, and he is not liable in an action of waste. Waste is an improper destruction or material alteration or deterioration of the freehold, or of things forming an essential part of it, done or suffered by a person rightfully in possession as tenant, or having but a partial estate like a mortgagor. It is not waste for a mortgagor of agricultural lands to sell timber, remove or change fixtures, if done in good faith, in the usual course of good husbandry, and before foreclosure

is begun or default has occurred upon the mortgage. Nor is it waste for him to sell stone from open quarries, or minerals from open mines, if done in the usual course of such business, though the product removed may exceed the value of the remaining freehold. These considerations lead to the conclusion that it is not waste for a tenant of nursery grounds, entering subsequent to a mortgage, to remove and sell in good faith and in the usual course of business growing nursery stock, if done before foreclosure is begun and not in apprehension of foreclosure and for the purpose of injuring the freehold and security. 47 Iowa, 439.

After foreclosure is begun plaintiff may, if the security is jeopardized, intercept through the aid of a receiver the rents or emblements, or both, upon the theory that the whole estate is pledged as security for the debt and that the creditor is immediately entitled to his money or the property pledged. 94 N. Y., 347; 5 Paige, 40. But in such a case a receiver is not entitled to recover for rents collected or emblements removed prior to the date of his appointment, his right being confined to subsequent rents and profits, and to the collection of rents uncollected at the time of his appointment. No case has been found, in the states in which the legal right to possession and to the rents and emblements continues in the mortgagor until sale, holding that a plaintiff may waive his equitable right to intercept through a receiver rents and emblements and recover them or

their value after foreclosure in an action at law. After foreclosure the mortgagee's right to recover of the mortgagor or his tenant for acts committed upon the land before the sale is limited to acts amounting to waste within the definition above given. See 4 N. Y., 110.

That, under the evidence, the statement of the mortgagor to plaintiff did not change the rights of the parties. The mortgage was a general lien under the law, and the evidence is insufficient to justify the conclusion that either party understood it to be a specific lien on the stock independent of its connection with the land. After the date of plaintiff's purchase the mortgagor and his tenants continued the business of growing new trees and selling those fit for market as before, without objection from the mortgagee, who never claimed a specific lien. A mortgagee may, by acquiescence, waive his right to recover for the removal of things belonging to the freehold. Jones on Mortg., § 692.

The evidence does not warrant the conclusion that defendants were trespassers on the land instead of tenants. 7 Barb., 263; Wood's L. & T., 67.

Judgment reversed, new trial ordered before another referee, costs to abide event.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### POLICE.

#### N. Y. COURT OF APPEALS.

The People ex rel. Swift, *applt.*, v. The Board of Police Com'rs, *respt.*

Decided June 26, 1885.

Where the testimony on charges against a police officer have been taken before only one commissioner it is sufficient to answer the requirement of Rule 181 of the Police Dept. that the evidence is laid before and examined by the several commissioners constituting the board at a regular meeting, even though only a quorum be present.

Affirming S. C., 18 W. Dig., 21.

This was an appeal from an order of General Term, affirming the proceedings of the Board of Police Commissioners in removing the relator and dismissing him from the police force. The Police Department of the City of New York was authorized to make rules for the government and discipline of the department. One of these (131) provides that in case testimony upon complaints made against any member of the police force shall be heard by less than three commissioners it shall be "laid before and examined by the several commissioners before judgment thereon." In this case the evidence was taken before one of the commissioners, and thereafter at a regular meeting of the board, when only three of the four commissioners were present, it was presented to and considered by them, and they adopted a resolution that the charges against the relator were true and that he be removed from the police force. The relator claimed that the action of the commissioners was void, as the evidence should have been laid before and examined by all the commissioners.

*D. C. Calvin*, for *applt.*

*D. J. Dean*, for *respt.*

*Held*, Untenable; that it was

sufficient to answer the requirement of the rule that the evidence was laid before and examined by the several commissioners constituting the board at a regular meeting thereof, a majority of them at any regular meeting being vested with power by the statute to perform any act within the jurisdiction of the board. Laws of 1874, Chap. 321; Laws of 1882, Chap. 410, § 46.

Order of General Term, affirming order of police commissioners, affirmed.

Opinion by *Earl, J.* All concur.

#### NEGOTIABLE PAPER. SURETYSHIP.

##### N. Y. COURT OF APPEALS.

*Coykendall, applt., v. Constable et al., impl'd, respts.*

Decided June 9, 1885.

P., the owner of a note in respect to which defendants, although makers, were in fact sureties, gave the same to an attorney for collection, the note being past due. The attorney gave it to a bank, also for collection, which sent the note to a correspondent bank endorsed for collection. Plaintiff, at the request of one of the makers and the principal debtor upon the note, directed the latter bank to charge it to his account, which was done and the proceeds remitted and paid to P. In an action on the note, *Held*, That the transaction was a sale of the note to plaintiff, and that defendants could safely pay it to plaintiff as holder.

Reversing S. C., 19 W. Dig., 169.

This was an action upon a promissory note given by De G. to P. to secure a loan of \$1,000. The note was signed by the other defendants also as makers, although they were in fact sureties. The note

was at one day and payable to bearer. It was not paid. About a year after its date P. gave it to his attorney for collection. De G. said he would pay it if it was sent to the bank of R., as he had money there. The attorney took it to the bank of E., whose cashier cashed and forwarded it to the bank of R. About that time De G. went to plaintiff, told him of the note and that suit was threatened, said he wanted to raise the money and wanted plaintiff to advance it. Plaintiff asked if it would be all right, and said De G. had better see some of the parties and learn if they were willing to transfer it to plaintiff. De G. said he had seen T., one of the defendants, and that he would deliver plaintiff the note. Plaintiff then went to the R. bank and told the cashier the note would be there and to charge it to his account. The R. bank paid the note, charged it to plaintiff and put it among his vouchers and delivered it to him. The bank of E. received the money and paid it to P., who did not know from whence the money came, and had simply authorized his attorney to collect it. In this action the sureties defend, averring that plaintiff is not the owner of the note, and that it has been paid to P.

*S. L. Stebbins*, for applt.

*John Lyon*, for respts.

*Held*, That the transaction between plaintiff and the collecting agent was a sale; that P. could not successfully sue upon it as owner, and defendants can thus pay the note which they have not paid to plaintiff as its holder with

entire safety; that no right of the defendants has been violated; that they agreed that the note might be sold when they made their contract negotiable.

*Also held*, That the sale of the note was ratified by P.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Finch, J.* All concur.

## BAR. TRUST. DAMAGES.

N. Y. COURT OF APPEALS.

Jackson v. Andrews et al.

Decided April 14, 1885.

A complaint in ejectment set up legal title and right of possession under certain deeds. The answer alleged that the premises were fraudulently included in a trust deed to plaintiff's grantor. Judgment was rendered awarding possession to plaintiff and damages for detention. *Held*, That such judgment simply vested a legal title in plaintiff derived from the trust deed, and left her as trustee in an existing trust and was not a bar to an action to set aside the trust as void.

In an action to declare a trust void the trustee is not chargeable with more than the rents received by him, there being no allegation or implication of wrongful entry or trespass.

This was an action to have a trust in certain real estate, conveyed by J., plaintiff's intestate, to defendant J. A., declared void.

One of the pieces in question, known as the brick house property, was conveyed by J. to J. A., and by J. A. to E. A. After E. A. died her heirs brought an action of ejectment against J. to recover possession of said premises. The

complaint set up both deeds, and contained a bare averment of legal title and right of possession resulting from said deeds. The answer averred that the premises were fraudulently included in the trust deed to J. A., and that his deed to E. A. was without consideration. The jury found for plaintiffs, and a judgment was rendered giving the plaintiffs in said action possession and damages for withholding it. This judgment was set up as a bar to the present action, so far as it relates to said brick house property.

*Joshua M. Van Cott*, for defts.

*Edward M. Shepard*, for plff.

*Held*, That the operative force of the judgment in the ejectment suit went no further than to vest a legal title and right of possession in E. A., derived from the deed of trust from J. to J. A., and left her in the position of a trustee in an existing and living trust.

It was sought to establish the relation between J. and J. A. of trustee and beneficiary. Defendants denied this, and sought to make their holding absolute. The judgment charged J. A. with the rents received. There was no proof that he neglected to obtain tenants as far as he could, or failed to obtain as much rent as he could, or did not manage the property to the best of his ability. Plaintiff claimed he was entitled to recover the full rental value of the property.

*Held*, Untenable, as neither the theory of the complaint or answer implied a wrongful entry or a trespasser's possession.

The judgment gave plaintiff the option within two years after the final close of the litigation to elect to take the outstanding tax titles, certificates and leases, upon paying therefor the sum shown by the referee's report to have been their cost to J. A., or to decline to take them. The evidence showed a general scheme on the part of J. A., by a devious maze of transfers, liens and sales, to entangle and cast a cloud on the title.

*Held*, That under the circumstances and in view of the denial of plaintiff's rights and the effort to subvert them, the good faith of these purchases by J. A. with a mere intent to benefit the estate is so doubtful that the court was justified in giving plaintiff the option to take or refuse them; but as considerable time has been afforded plaintiff to investigate said titles, the two years should be changed to six months from the entry of judgment in this court.

Judgment of General Term, modifying judgment for plaintiff, modified, and as modified affirmed.

Opinion by *Finch, J.* All concur.

[Motion for reargument denied June 23, 1885. No opinion.—ED.]

#### PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The Union Insurance Co., *respt.*,  
v. Melancthon Vandercook, *applt.*

Decided June, 1885.

In an action against an agent for insurance premiums not returned to the company, the answer alleged as a counter-claim a

malicious arrest under an order of the court, slander, with special damage, and the purloining of defendant's account-books, which caused him injury. *Held*, that these defences were not admissible under Code, § 501, Subd. 1.

The action was against an agent who had not returned premiums received. An order of arrest was obtained in this action and served, as the answer alleges, at such a time that defendant could not get bail and was locked up in jail. The answer also set up slanderous things said of him by the officers of plaintiff. It also alleged that plaintiff had purloined his books of account, which contained the names of his customers, and that defendant had been at great expense to regain them. A demurrer was sustained.

*I. C. Ormsby*, for applt.

*Williams & Potter*, for resp't.

*Held*, That the matters stated were founded wholly in tort, and did not in any proper sense arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, nor were they connected with the subject of the action.

Interlocutory judgment affirmed, with leave to plead over.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Bockes, J.*, concur.

#### NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Isabella C. Hoag, admrx., *applt.*,  
v. The N. Y. C. & H. R. RR. Co.,  
*respt.*

Decided May, 1885.

Deceased was riding in a wagon with her husband from the north; defendant's tracks crossed the highway east and west; of these there were four—two freight, two passenger; the most northerly tracks were for freight; these were four feet and a half lower than the passenger tracks; between the two sets of tracks was an open space seventy feet wide, and from the freight tracks the passenger tracks could be seen for a mile. When deceased approached the railroad a freight train going west was passing. This shut off the view towards the west. The husband waited until the freight train passed, and at once drove over the freight tracks and over the intervening space, and upon reaching the southern passenger track the wagon was struck by an express train, not ringing its bell, and the occupants were killed. The court nonsuited plaintiff upon the ground that there was no evidence that the deceased had not been guilty of contributory negligence. *Held*, That the nonsuit was proper.

The action was for negligence, as stated above. On the motion for a nonsuit the court said: "I understand the law to be that if anybody is approaching a railroad crossing he is bound to stop and look both ways before crossing the track. I hold it was necessary to give some evidence that the deceased, as matter of fact, did make use of the common attributes that were given her for the purpose of discovering whether there were any obstructions on these tracks."

*G. L. Stedman*, for applt.

*Hamilton Harris*, for resp.

*Held*, That the nonsuit was right. While deceased was moving over the space between the freight and passenger tracks, seventy feet wide, the train which killed her was in plain sight had she looked west. Plainly she did not look once in that direction. The fact

that she was riding with her husband did not excuse her vigilance. Possibly his negligence should have stimulated it.

Judgment affirmed.

Opinion by *Landon, J.*; *Bockes, J.*, concurs, and adds that he does not think the fact that the deceased was riding with her husband wholly excused her from making observation to avoid danger. *Learned, P. J.*, dissents.

### HIGHWAYS.

#### N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The People ex rel. Henry S. Edwards v. Charles O. Potter, Com'r of Highways, et al.

Decided April, 1885.

Applicants for a highway are not proper persons to serve as jurors to determine the necessity of the proposed road, and their names should be excluded from the jury box before the drawing.

The omission of a name from the box by a mere clerical error, where no harm results to the owner of the premises therefrom, will not invalidate the proceedings.

*Certiorari* to review order of the commissioner of highways laying out a public highway through the enclosed and improved land of relator.

Application having been made for the highway the commissioner, town clerk and a justice of the peace met to draw a jury to inquire and certify as to the necessity for the proposed highway, relator being present with counsel. The clerk deposited in a box the names of all the trial jurors of the town except nineteen; fifteen of whom had signed the application

for the highway; two of whom were of kin to the relator in the sixth degree; one of whom was then a non-resident of the town, and one of whom, Albert Lambrecht, or Lambert, was omitted by a clerical error, the justice omitting to read the names. Relator's counsel "objected to leaving out of the box \* \* each and all the names of jurors mentioned," but it did not appear that he specially objected to the omission of any particular name.

The jurors drawn were duly summoned and sworn and eleven of them certified to the necessity of the proposed road. The commissioner appointed a day for his decision, of which relator had notice, and on that day the highway was laid.

This writ was obtained because of the omission of the nineteen names.

*Held*, No error. It is a fundamental principle of the common and statute law of this and of all civilized governments that a man shall not be a judge or juror in his own case; and the courts will not hold that the legislature has abrogated this principle unless it is plainly declared by statute. The language of this statute does not evince a design to permit parties to proceedings to lay out highways to act as jurors in proceedings instituted by them. Applicants are, to all legal intents and purposes, parties. If the jury fails to certify that the proposed highway is necessary the applicants are liable for the costs of the proceeding. 2 R. S., 7 ed., 1240, 1241. It is very

plain that applicants are not proper persons to serve as jurors and decide a question which they have predetermined and in the decision of which they have a direct pecuniary interest. The statute contains no provision for challenging or excluding from the jury persons drawn: the intent being to exclude disqualified persons from the box before the drawing. The term "who are not interested in the lands through which such road is to pass or to be located" does not limit the class to persons interested in the land as owners, occupants or lienors, but includes all persons having a direct personal and pecuniary interest in having the lands taken for the purpose of a highway. The names of the applicants were properly excluded from the box from which the jury was drawn.

The name of Adam Lambrecht, or Lambert, was omitted by a clerical error. It does not appear that relator or any person called the attention of the officers to this omission at the time; if it had been, the presumption is that the name would have been placed in the box. It is not shown or claimed that relator was injured by this clerical mistake. It is not claimed that any of the persons who were drawn and served as jurors were disqualified or partial. This harmless clerical error did not invalidate the proceedings. A construction of this statute so technical as contended for by relator would amount to a practical nullification of it. Suppose that the name of some person of kin to relator



whose kinship was unknown to the officers had been placed in the box, and twelve competent persons then drawn and served, would it be held that the jury was illegal and the subsequent proceedings null and void by reason of this or a like mistake? We think not. An irregularity, mistake or error in the organization of a jury, insufficient to invalidate an indictment for a felony, should not be held sufficient to invalidate a proceeding like this. 92 N. Y., 128.

Order of commissioner affirmed, with costs.

Opinion by *Follett, J.; Hardin, P.J.*, concurs; *Kennedy, J.*, dissents.

RES ADJUDICATA. MERGER.  
N. Y. COMMON PLEAS. GENERAL TERM.

Peter Townsend, *respt.*, v. Casius H. Read et al., *appls.*

Decided May 15, 1885.

The defendant in an action to recover an installment of rent cannot interpose a defense which was equally applicable to an action for a prior installment in which he did not interpose said defense, but permitted a recovery.

A sub-tenant cannot plead a technical merger as a defense to an action for an installment of rent brought by the original landlord under an assignment to him of the lease with the sub-tenant, where the rent is payable on the first of each month, and the assignment was made during the month sued for and after the first.

Appeal from judgment against defendant for rent due Dec. 1, 1882, in advance, on lease of certain premises made by M. A. Kieff to L. C. Cocks, for a term of eight

months from September 1, 1882. The lease was assigned to plaintiff December 14, 1882, said Kieff being a tenant of plaintiff of the same premises sublet by her to Cocks. Prior to this action 'an action had been brought by Kieff for the rent of October and November, 1882, and after the same had been referred for trial the present plaintiff was substituted for plaintiff in Kieff's place on the production of said assignment, and judgment was finally rendered in his favor for said rent against these defendants, who were sureties for Cocks on her lease. Said defendants contended that there was no liability on account of the merger. Plaintiff contended that the effect of the former judgment was to bar defendants from raising said defense.

*C. Fine*, for *appls.*

*I. T. Williams*, for *respt.*

*Held*, That as all defenses to the December rent were available to the prior two months' rent, and as defendants permitted a recovery for the latter without seeking to set up this defense when Townsend was substituted therein at their request as plaintiff, they have lost the right to urge the defense as against a claim for rent falling due before the assignment.

*Further held*, That the defense is not good on the merits. The rent being payable in advance, on December 1, 1882, a subsequent technical merger would not affect the right of recovery. 4 N. Y., 270.

Judgment affirmed, with costs.

Opinion by *Daly, J.; Allen, J.*, concurs.

# SUNDAY. SUMMARY PROCEEDINGS.

## N. Y. COMMON PLEAS. GENERAL TERM.

Albert Boehm, *respt.*, v. Mayer Rich, *applt.*

Decided March 13, 1885.

Where the rent is payable on the first of each month in advance, and the first of the month is Sunday, the tenant has till midnight of the second to pay his rent. In such a case where the landlord on the second of the month obtains a summons in summary proceedings to dispossess the tenant for non-payment of rent, and the tenant before the return day removes in pursuance thereto, this constitutes a surrender by the tenant and an acceptance by the landlord of the premises, and the tenant is not liable for the ensuing month's rent, even though the landlord does not continue the proceedings.

Appeal from judgment of a district court of the City of New York in favor of plaintiff.

Action by tenant to recover deposit made by him as security for rent and retained by landlord as applicable to rent claimed by him to be due from tenant. The rent was payable by the lease in question, which was under seal, on the first of each month in advance. On the 2d of June, 1884, defendant, as landlord, obtained and served on plaintiff, as tenant, proceedings to dispossess plaintiff for non-payment of rent. Before the return day of the summons plaintiff removed from the premises in question. Nothing further was done in the dispossess proceedings. The first day of June, 1884, fell on Sunday.

*C. Fine*, for *applt.*

*John Lindsay*, for *respt.*

*Held*, That the judgment should be affirmed. The removal of the tenant in pursuance of the summons was on the part of the landlord and the tenant a surrender and acceptance of the premises, and the continuation of the summary proceedings by the landlord was not in such a case necessary. The issuing of a warrant in summary proceedings puts an end to the lease so far as respects any future obligation of either party, though it does not discharge the rent then due and payable. In like manner the surrender of the premises would not relieve the tenant from the obligation to pay rent if any were then due. But there had been no default in this case when the summary proceedings were instituted. The 1st of June, 1884, being on Sunday, the tenant had till 12 o'clock midnight of the 2d of June to pay the rent. 20 Wend., 205; 2 Conn., 69; 4 Bosw., 319; Taylor's Landlord and Tenant (5th ed.), 288, § 391.

Judgment affirmed.

Opinion by *Daly, Ch.J.*; *Van Hoesen, J.*, concurs.

## DEED.

## N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

The Syracuse Savings Bank v. George A. Porter et al., *respts.*, Emily Howland et al., *appls.*

Decided April, 1885.

A deed of premises was made to a mother "in trust for" her infant children, "with power to sell or mortgage without the appointment of a guardian." She mortgaged it for her own benefit. On foreclosure of a prior mortgage, *Held*, That the title was vested in the infants; that

the mother had no beneficial interest, and that the infants were entitled to the surplus.

Appeal by infant defendants from decree on foreclosure adjudging that the subsequent mortgagees are entitled to priority over them as respects the surplus.

In July, 1876, Cornelia H. Burton, being the owner of a house and lot on which she has just given the mortgage in question, conveyed it to Mrs. H., who subsequently executed a quit-claim deed running to "Cornelia H. Burton \* \* in trust for Anna G. Burton, Grace Burton and Burr Burton, with power to sell and convey or mortgage without the appointment of a guardian of the second part." The granting clause runs "unto the said party of the second part and to their heirs and assigns forever," and the deed concludes, "to have and to hold the said described premises to said party of the second part, their heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, their heirs and assigns forever." Anna, Grace and Burr are infants.

Subsequently Mrs. Burton mortgaged the premises to George A. Porter as collateral to another mortgage given by her, and also mortgaged it to Holden Bros. and to the D., L. & W. RR. Co. as security for a debt of her husband and for any future indebtedness she might contract.

In this action Mrs. Burton and the infants answered that the subsequent mortgages were binding only upon her interest and not upon the interest of the infants.

The sole issue was whether the subsequent mortgagees or the infants were entitled to the surplus.

The infants contend that the title remained in Mrs. H. subject to the execution of the power by Mrs. Burton for their benefit and that the power of sale is a power in trust; while the mortgagees contend that the title vested in the infants subject to the power to sell, which they claim was a beneficial power.

The court held that a trust valid under the Rev. Stats. was not created by the deed and that the title vested in the infants and that the subsequent mortgagees were entitled to priority over the infants.

*Hancock & Munro*, for applts.

*Louis Marshall*, for respts. Holden and RR. Co.

*Chas G. Baldwin*, for Porter and other respts.

*Held*, That the trial court correctly held that the title vested in the infants. The parties attempted to create an express trust for a purpose not authorized by the statute, and the title vested in the infants under § 49 of the article of the Rev. Stats. entitled "Of uses and trusts."

*Also held*, That the deed created a power in trust and not a beneficial power. The power authorizes the alienation in fee to any alienee whatever, and it is a "general power." 1 R. S., 732, §§ 77, 78. A power is "beneficial" "when no person other than the grantee has by the terms of its creation any interest in its execution." *Id.*, § 79. "A general power is in trust when a person, or class of persons, other

than the grantee of such power is designated as entitled to the proceeds or any portion of the proceeds or other benefits to result from the alienation of the lands according to the power." 1 R. S., 734, § 94.

We think that the deed vests the entire title in the infants for their sole benefit, and that it confers no beneficial interest in the land upon the mother, and that she has no pecuniary interest in the land or in the execution of the power. 55 Barb., 85; 42 N. Y., 531; 4 Kent Com., 318. The words "with power to sell and convey or mortgage without the appointment of a guardian" indicate an intention, in connection with the other language in the deed, to vest the title in the infants and enable the mother to transfer or encumber it for their benefit without incurring the expense and trouble of an application to the court for leave to sell or mortgage under the statute through a special guardian.

The infants are entitled to the surplus after payment of the judgment of foreclosure and the expenses of a sale, if it goes to a sale.

Judgment reversed so far as affects the rights of defendants in surplus and awards costs to subsequent mortgagees out of the fund, with one bill of costs to infants against respondents.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### ABANDONMENT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People ex rel. Robert H.

Drake, *applt.*, v. Garret Bergen, police justice, *respt.*

Decided May, 1885.

Chap. 171, Laws of 1882, amending Chap. 895, Laws of 1871, has relation only to abandonment in the County of Kings, and does not authorize proceedings against a husband who abandoned his wife in another state, although she afterward moves into Kings county.

The words "leaves them" in said statute refers to the original leaving.

*Certiorari* to review conviction of relator by defendant, on a charge of abandonment of his wife and child, under Chap. 171, Laws of 1882, amending Chap. 395, Laws of 1871.

Relator was married to his wife about twenty-six years and they have a son 23 years old.

The wife, on her cross-examination, testified that "I have resided in Sackett street five or six weeks with a friend, not relative, or paying board. I came to Brooklyn from Jersey City; lived there thirty-three years; been married twenty-six years to defendant (this relator); child is 23 years. It is four years since I have seen or spoken to my husband until his arrest. I last before saw him in New Bedford, Mass.; was there one day; then lived in Greenville, N. J., with my brother. When we separated I lived in Greenville, N. J. He left me no property." Her brother testified that her husband left her in October, 1879.

*B. F. Strauss*, for *applt.*

*A. Simis, Jr.*, for *respt.*

*Held*, That respondent had no jurisdiction to entertain the proceedings. From the testimony taken together it appears that the

abandonment was in the State of New Jersey. It was decided at the General Term in this district in May, 1878, that the fact that a husband abandoned his wife and children in another state, and that the wife subsequently came to reside in Brooklyn, did not authorize proceedings against the husband under the act of 1871. Our decision proceeded on the ground that the abandonment of a wife by her husband was made by the statute a *quasi* criminal offense, and that the police magistrate of the City of Brooklyn had jurisdiction only of crimes committed in that city, and that the testimony of the wife disproved the abandonment there. 14 Hun, 181. This case falls directly within that decision.

It is true the amendatory statute of 1882 enlarges the statute of 1871 by an addition of the words "or who shall leave them in danger of becoming a burden on the public, or who shall neglect to provide for them according to their means." Yet the crime is abandonment, and the words "leave them" refer to the original leaving, and if it is intended to make "neglect to provide for them according to their means" an additional or new offense there is no proof here to make the husband guilty. There is no proof that he had any means.

We prefer to place our decision on the want of jurisdiction. The original law had relation only to abandonment in the County of Kings, and the amendatory statute was intended to have the same

scope and be subject to the same limitation.

Proceedings reversed.

Opinion by *Dykman J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

## FALSE IMPRISONMENT. STATUTES.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

Peter Fassett, by guardian, v.  
The Society for the Protection of  
Destitute Roman Catholic Chil-  
dren at the City of Buffalo.

Decided April, 1885.

By Chap. 364, Laws 1864, defendant was authorized and empowered to "take, receive and hold under its care and control children of Roman Catholic parentage between seven and fourteen years of age who may be committed to its care as idle, truant, vicious, homeless or vagrant children," etc. *Held*, That this statute confers no right or power to detain children after they have arrived at the age of fourteen years.

Upon a commitment as a homeless child, no trial and conviction and the filing of a record thereof, as in cases of children charged with vagrancy or petit larceny, is required.

It being the duty of the magistrate to cause a notice of the commitment to be served upon the parent, it will be presumed that the officers performed their duty, especially as it appeared that plaintiff's step-mother caused his commitment, and his father shortly thereafter visited him.

Motion for new trial on exceptions ordered heard at General Term in first instance.

Action to recover damages for false imprisonment. Plaintiff had a verdict in his favor. Defendant was incorporated by Chap. 364, Laws of 1864, as amended by Chap. 701, Laws of 1865. Plaintiff was

a child of Roman Catholic parentage, and was committed to the care of the corporation at the age of eleven years, and detained by it for eight years, when he was discharged on *habeas corpus*. Plaintiff's father was confined in jail in Canada, and he was living with his step-mother, who had two children of her own and had to support them by doing washing; she was unable to support plaintiff, and he had been upon the streets two days, when she consulted Bishop Timon as to what should be done with him, and then she took him before the police justice, made a statement to him, and the justice then committed him to defendant's protection, and she accompanied him to the house of reception. Shortly after, plaintiff's father was discharged from jail and called upon him at defendant's institution.

By the act of incorporation defendant was authorized "to take, receive and hold under its care and control, 1st, Children under the age of fourteen years, who by consent in writing of their parents or guardians may be entrusted to it for protection or reformation. 2d, Children of Roman Catholic parentage between seven and fourteen years of age who may be committed to the care of such corporation as idle, truant, vicious, homeless or vagrant children, and those guilty of petit larceny, by the order or judgment of any magistrate, etc., empowered by law," etc. Section 8 provides that whenever any such child shall be brought by any constable or policeman before

any magistrate, etc., upon the allegation that it was found in any street, etc., in circumstances of want and suffering, abandonment, exposure, neglect or beggary, or shall be arrested and brought before any such magistrate, etc., by virtue of the statute relating to vagrants or disorderly persons, and it shall be proved to the satisfaction of the magistrate, by competent testimony, that said child is embraced in the foregoing provisions of this section, or is guilty of petit larceny; and it shall further appear that by reason of the neglect or vicious habits of the parents, or other lawful guardian of such child, that it is a proper object for the care of this corporation, such magistrate, instead of sending or committing such child to the jail, etc., may in his discretion by warrant or order in writing under his hand, commit such child to this corporation to remain under its care and control until discharged in manner provided by law. The form of the commitment is prescribed, but it is not required to state the grounds or charge upon which the child is committed, only that "he has been proved to me to be a proper object for the care and control of the corporation," and commanding the superintendent to receive and keep said child until discharged according to law. Section 10 provides that the magistrate shall immediately deliver to a constable, etc., a notice addressed to the father, if living and a resident within the city where the child was found; if not, then to its mother; if none, then to the law-

ful guardian, if any; or, if none, to the superintendent of the poor, informing them of the commitment of such child to the house of reception, and that unless taken therefrom within twenty days after the service of such notice, the child will be committed to the asylum of the corporation. Section 11 provides for the manner of service and return thereon, and that the officer serving it shall also immediately enter in a book to be kept by the corporation the fact of having served the notice. If the parent, etc., cannot be found, then the superintendent of the institution is required to cause notices to be posted. Section 12 provides that if within the time prescribed it shall be proved to the satisfaction of the magistrate that such child is not of Roman Catholic parentage, or that the condition of the child has not been occasioned by the habitual neglect or misconduct of the parents, etc., the magistrate shall order its release. Section 13 provides that if such proof shall not be produced, the magistrate shall give notice to the institution, and thereupon the child shall be removed from the house of reception to the asylum of the institution. Section 14 authorizes the institution to release the child if improperly committed, etc.

Defendant claimed that the court erred in charging the jury that it had no right to retain plaintiff in its custody without a second mittimus or other warrant from the police justice, authorizing it so to do after the twenty days had ex-

pired, and in refusing to charge that defendant was warranted in assuming that the police justice and police officers had done their duty in the matter and given all proper notices, etc.

*Calkins & Emery*, for plff.

*George L. Lewis*, for deft.

*Held*, That the statute does not give defendant the right or power to detain children after they have arrived at the age of fourteen years.

*Held also*, That as plaintiff was committed as a homeless child, no trial and conviction as in case of a charge of vagrancy under the statute, or upon a charge of petit larceny, and the filing of a record thereof, was necessary or required, and that the form of commitment was prescribed for such a case. This form of commitment can only be adopted and used in cases where the child is committed as idle, truant, vicious or homeless; it was not intended for cases of conviction for vagrancy or petit larceny.

*Held further*, That as it was the duty of the officers to give notice of the commitment to the parent, it will be presumed that they performed their duty. No second mittimus or warrant is required by the statute. Besides, the parents had actual notice.

Defendant was not authorized to discharge the child at the expiration of twenty days, even if the notices had not been given. He was committed until discharged according to law: first, on his arrival at the age of fourteen years; second, by the committing magistrate as provided in the twelfth

section; third, by the board of managers under section fourteen. The failure of the police justice to give the notice prescribed by the tenth section would not justify defendant in turning out of its doors in the dead of winter a child of tender years entrusted to its care, with no person to receive and care for its welfare.

New trial granted.

Opinion by *Haight, J.*; *Bradley, J.*, concurs; *Barker, J.*, dissents.

#### MORTGAGE. USURY.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The First National Bank of Whitehall, *respt.*, v. Wm. A. Griswold et al., *applts.*

Decided May, 1885.

A mortgage, not accompanied by a bond, and which contains no covenant of payment is not usurious even if it appear that it was drawn for a greater sum than the mortgagee intended to advance under it. Under such a mortgage the recovery will be limited to the advances proven.

Nor does it establish or affect the question of usury that the complaint claims for the whole sum secured by the mortgage.

The defendant, Wm. A. Griswold, gave a mortgage to his father which stated that it was intended as security for the payment of \$10,000 in four years, with interest. No bond was given. The answer alleged that the agreement between the parties was that the father was to advance from time to time to the son \$8,000 only, and that the mortgage was drawn up for \$10,000 upon the usurious agreement that the mortgagor

should pay that sum and interest for \$8,000 to be advanced. No money was advanced at the time, but subsequently the father took an assignment of a prior mortgage upon the premises, and made other advances, in all \$8,415. Plaintiff held a note of the son endorsed by the father for \$9,320. It took the mortgage and bond assigned to the father and the \$10,000 mortgage and accepted them in payment of the note, with the son's knowledge. The referee found that the contract was not usurious. He found that the mortgage was to be held as security for moneys to be advanced as required by the son.

*John A. Vance*, for applts.

*R. L. Hand* and *James Spencer*, for *respt.*

*Held*, That the referee's finding was correct. In the absence of a bond the mortgagee must prove the debt the mortgage was given to secure. The mortgage itself contains no agreement to pay anything. The recovery on the mortgage would be limited to the advances proven. The mortgage itself is not an obligation of debt, but is a collateral security for such debt as may be proved. 1 How. Ct. of App. Cases, 303. The appellant claims the pleadings establish that there was usury, because both complaint and answer state that the son promised to pay the father \$10,000 and gave the mortgage as collateral security therefor. But the answer admits only a naked promise and does not admit any antecedent indebtedness. It also denies all indebtedness. The fact that plaintiff



claimed the whole amount and proved less, does not aid defendant. 1 Keyes, 181.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

### SALARY.

#### N. Y. COURT OF APPEALS.

*Morris, applt.*, v. The Mayor, etc., of N. Y., *respt.*

Decided May 8, 1885.

Plaintiff was a clerk in the Fire Dep't of N. Y. The commissioners made an order relieving him from duty as clerk and continuing him as messenger at a lower salary, which he received, receipting in full. He continued to perform duties of a similar character and at the same place as before. *Held*, That the order simply accomplished a reduction of salary, which the commissioners had power to make.

This action was brought by plaintiff, who had been appointed a clerk in the Fire Department of the City of New York, on August 30, 1875, at a salary of \$1,200 per annum, to recover \$2,400 balance of his salary alleged to be due from August 31, 1875, to January 1, 1882. The answer admitted plaintiff's appointment, but averred that from December 31, 1875, to January 1, 1882, his salary was only \$800 per annum. It was proved that plaintiff performed clerical duties of the same character and at the same place, during the entire period of his employment; that on December 1, 1875, the fire commissioners made an order relieving plaintiff from duty as clerk and continuing him in service as messenger, at a salary of \$800; the monthly pay-rolls were

put in evidence, showing his receipt in full for all services performed.

The complaint was dismissed on the ground that the proofs showed simply a reduction of plaintiff's salary, which the commissioners had power to make.

*Peter Mitchell*, for applt.

*D. J. Dean*, for respt.

*Held*, No error; that nothing was accomplished by the order but a reduction of salary, which the commissioners had power to make and which was not forbidden by the statute. Laws of 1873, Ch. 335, § 28; 96 N. Y., 331.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Danforth, J.* All concur.

### PARTIES. RECEIVERS.

#### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Merchants' Loan & Trust Co., *applt.*, v. Henry Clair, *respt.*

Decided May 8, 1885.

Under § 449, Code of Civ. Pro., an action to collect a debt owing to a New Jersey corporation which has been dissolved and a receiver of its property appointed under the laws of N. J. cannot be prosecuted in this State by the receiver in the name of the corporation, although by the laws of N. J. the receiver is empowered to prosecute an action in that form.

Appeal from judgment entered upon dismissal of complaint.

This action was brought upon a note given by defendant to plaintiff, which was a corporation created under the laws of New Jersey. Previous to the commence-

ment of the action plaintiff was dissolved and a receiver of its property appointed by the Court of Chancery of N. J., and the complaint in this action was verified by such receiver. By the statute of N. J. under which the receiver was appointed he was empowered to prosecute and defend suits in the name of the corporation or otherwise, Statutes of N. J., revision of 1877, 187, but it was insisted by defendant that under § 449, Code of Civ. Pro., declaring that every action must be prosecuted in the name of the real party in interest, this suit could not be sustained in this State; and upon motion of defendant the complaint was dismissed at circuit.

*John A. Mapes*, for applt.

*Delos McCurdy*, for respt.

*Held*, That by the dissolution of plaintiff it was disposed of as a corporation and its receiver succeeded to the title to all its property to be held for the benefit of its creditors, and such receiver had the right to sue in the courts of this State. 6 Lans., 25; 32 N. Y., 43. That the object of the section of the Code under consideration was to give full effect to transfers, so that the transferee or assignee could maintain an action in his own name, being the party in interest; and when the transfer is made the party becomes possessed of the legal title and may maintain the action. 25 N. Y., 627; 1 E. D. Smith, 273; 74 N. Y., 486.

That the statute of N. J. authorizing the receiver to bring an action in his own name or other-

wise had no extra-territorial force. That the *lex fori* governs as to the manner of commencing actions and a claim presented by a foreign creditor to our courts must be prosecuted in the name of the real party in interest for the reason that our statute so declares.

Judgment affirmed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

## CONTRACT. EVIDENCE.

N. Y. COURT OF APPEALS.

*Marsh, respt., v. McNair, applt.*

Decided May 8, 1885.

Plaintiff and her sons executed an instrument assigning certain life policies and all their rights therein to defendant's assignor in consideration of his giving certain credits on indebtedness to him by one of the sons, and of his paying off a mortgage. In an action to reform the assignment no fraud or mutual mistake in its execution was alleged. *Held*, That parol evidence was not admissible to show that plaintiff signed it on an assurance that it was intended only as collateral security.

This action was brought to have an assignment of a policy of insurance, executed by plaintiff to G., defendant's assignor, reformed. It appeared that in April, 1869, J. and C., plaintiff's sons, procured policies of insurance on their own lives for \$5,000 each; the one on the life of J. being payable to C., and that on the life of C. being payable to plaintiff. The policies remained in the possession of G. until May, 1872, he having up to that time advanced money to pay the premiums and holding the policies as collateral security for an indebtedness to him from J. and C. On that day

plaintiff assigned the policy which was payable to her by an assignment absolute in form for the express consideration of \$1, "and for other valuable considerations." At the same time and place plaintiff with her two sons executed an instrument by which they jointly and severally assigned the policies and all their rights and interests therein to G., in consideration of his crediting C. \$353.72, paying a mortgage of \$110.46 on property deeded by J. to G., and endorsing \$38.52 made by C. The mortgage was paid and the credits given as agreed. In February, 1874, G. made a general assignment to defendant for the benefit of creditors and assigned the policies as a part of his assets. The assignee subsequently collected the policy on the life of J. Plaintiff claims that the assignment to G. was made merely as collateral security for an indebtedness to him of \$500 due from her sons, tendered him that amount and demanded the money recovered by the assignee upon the policy, and upon his refusal brought this action. No allegation of fraud or mutual mistake in the execution of the assignment was made in the complaint. Upon the trial plaintiff gave parol evidence to show that the assignment was executed by plaintiff upon an assurance that it was only intended as collateral security for \$500, and that plaintiff signed it for that purpose.

*E. A. Nash*, for applt.

*J. B. Adams*, for resp't.

*Held*, That the court erred in receiving parol evidence varying

or contradicting the assignment; that plaintiff was concluded by it.

*Also held*, That the instrument in question was not an assignment or transfer of the policy merely, but a contract in writing within the rule which prohibits parol evidence to explain, vary or contradict such contracts. 1 Greenl. on Evi., 275; 16 Wend., 461; 14 id., 117; 4 Hill, 104; 5 Sandf., 568; 8 N. Y., 402; 49 id., 107; 56 id., 429; 62 id., 105; 69 id., 286; 74 id., 530; 1 Abb. Ct. App. Dec., 461; 98 N. Y., 288.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial ordered.

Opinion by *Earl, J.* All concur, except *Ruger, Ch. J.*, dissenting.

#### UNDUE INFLUENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

*Emily Tucker, resp't., v. Charles A. Dean, appl't.*

Decided May 8, 1885.

When relations exist between two persons founded upon ties of blood, love and affection, to which are added those of confidence in fiduciary matters, and a contract is made or any other proceeding adopted by which one disposes to the other of all his property, the law regards the transaction with great jealousy and requires that it shall be established by testimony so reasonably certain as to establish beyond reasonable doubt, not only the fairness and validity of the transaction on its merits, but that it was not the result of undue influence exerted through the elements above stated.

Appeal from judgment of Special Term, setting aside a confession of judgment made by one Ann Eliza Dean.

In 1872 Ann Eliza Dean, who was at that time a lady well advanced in years, confessed judgment to defendant to an amount sufficient to absorb her whole estate. Defendant was the nephew of Miss Dean and was regarded by her with great affection and had managed her business affairs for a number of years.

In 1871 Miss Dean had made a will appointing defendant sole executor and making him residuary legatee.

After the death of Miss Dean, defendant, suppressing the fact of his holding the judgment mentioned, qualified as executor and administered the estate, making no revelation of the existence of the judgment until called upon to account as executor.

Thereupon plaintiff, who was a legatee under the will, brought this action to set aside the said judgment.

*John E. Parsons*, for applt.

*Geo. C. Lay*, for resp't.

*Held*, That it seemed incomprehensible that defendant should have qualified as executor when he knew perfectly well that if his judgment was good the whole estate was absorbed and his already by virtue of his judgment, and his conduct was inexplicable except upon the proposition that he doubted its validity and intended to protect himself against adverse contingencies by accepting the trust imposed by the will and taking the benefit of its provisions.

That the testatrix and judgment debtor was exposed to influences to which she might have readily

yielded on account of her age, and that whatever transactions took place between her and defendant should have been open without any attempt at concealment or suppression either of them or their results or consequences.

That when relations exist between two persons founded upon ties of blood, love and affection, to which are added those of confidence in fiduciary matters, and a contract is made or any proceeding adopted by which one disposes to the other of all his property, the law regards the transaction with great jealousy and requires that it shall be established by testimony which must be so reasonably certain as to establish beyond reasonable doubt not only the fairness and validity of the transaction on its merits, but that it was not the result of undue influence exerted through the elements above stated.

Judgment affirmed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

#### LEASE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Emelin W. Wadsworth*, general guardian, *applt.*, v. *James W. Wadsworth et al.*, *respts.*

Decided April, 1885.

A renewal of a lease operates as a renewal of all the provisions contained in or made a part of the lease.

A farm lease made in February, 1879, for the term of one year, provided that if the lessee should not lease the farm for 1880, he must deliver to the lessor, by September, 1880, one-third of the crop of winter wheat raised on the pasture lot. The

lease was renewed for one year from April, 1880, and in the fall the lessee put in a crop of winter wheat upon said lot, and in the summer of 1881 harvested the same. The lease was not renewed for 1881. Plaintiff claimed one-third of said wheat. *Held*, That said provision of the lease continued in operation upon the renewal, and plaintiff was entitled to recover.

Appeal from judgment entered upon the report of a referee.

Action to recover damages for a breach of the conditions of a farm lease made in February, 1879, for one year. Attached to the lease was a bill of rent, containing a description of the various lots comprising the farm, with the course of husbandry prescribed for each. The "tavern-lot," and "toll-gate" lot were entered as pasture. At the end of the printed part of the lease was the following in writing: "The lessees are hereby permitted to plough about fifty acres of the "tavern-lot" for spring grain, and in the fall put the same into wheat instead of pasturing it as above provided, and in case said lessees do not lease said farm for 1880, they are to deliver to lessor one-third of the crop of wheat raised on said lot by September, 1880.

At the termination of the lease defendants again leased the farm for 1880, and there was endorsed upon the back of the lease the following: "This lease is hereby extended for one year from April 1st, 1880," and signed by the parties. In the fall of 1880, defendants put in a crop of winter wheat upon the "tavern-lot," and in the summer of 1881 harvested the same. The lease was not again renewed upon its expiration in April, 1881.

Plaintiff claimed the right to recover the value of one-third of the wheat raised upon the tavern-lot and harvested in the summer of 1881. The referee held that she was not entitled to recover.

*J. B. Adams*, for applt.

*Hubbard & Howard*, for respts.

*Held*, Error. The article supplemental in writing is a part of the lease; it immediately follows the printed portions and is over the signatures of the parties. The rental provided for in the lease and in the bill of rent attached was for the year during which the lease ran. The putting in of the crop of winter wheat necessarily prevented the use of the land occupied by it during the next year, or until the crop could be harvested. To cover this the parties stipulated that in case the farm should not be rented for the year 1880 plaintiff should be entitled to receive one-third of the crop of wheat raised. The renewal of the lease endorsed upon the back of it for the year 1880, and until April, 1881, renewed the supplemental article as well as the other provisions of the lease, and its effect was to change the dates, so that in case a crop of wheat should be put upon this lot in the fall of 1880, and the farm should not be leased by defendants for the year 1881, that plaintiff would be entitled to one-third of the crop of wheat raised and harvested in the summer of 1881. This seems to be the plain import and meaning of the renewal, and appears to have been the understanding of the parties.

Judgment reversed and new trial ordered.

Opinion by *Haight, J.; Barker and Bradley, JJ.*, concur.

#### COSTS. ASSIGNMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Olmsted v. Mary L. Keyes et al.

Decided April, 1885.

One taking an assignment of a claim after judgment rendered against its validity and prosecuting an unsuccessful appeal is liable for all the costs of the action and the appeal.

Appeal from order of Special Term, denying motion of Mary L. Keyes to compel L. W. Bignall to pay her the costs, &c.

Plaintiff, as trustee, collected a sum of money upon a life insurance policy issued upon the life of L. V. Keyes, which was claimed by defendant Vosburgh and others, children of the deceased by his first wife; and also by the defendant Mary L. Keyes, his widow. The action was brought for the purpose of determining their conflicting claims, and judgment was rendered in favor of Mary L. Keyes awarding her the fund with costs against the other defendants, who appealed to the General Term and the Court of Appeals, and the judgment in each court was affirmed. Motion was then made by Mary L. Keyes to compel Bignall to pay her the costs allowed her upon the entry of the judgment of Special Term, and also the costs allowed her in the General Term, upon the ground that Bignall, after entry of

judgment and before appeal taken, purchased the interests of the other defendants, took an assignment thereof, and then prosecuted the appeal in their names. The motion was denied and this appeal was taken. The General Term held that the affidavits established the fact that Bignall became the purchaser, as alleged, that he caused the appeals to be taken and was to have the money in case he succeeded; that in consideration of the claim he was to pay the expenses and, if successful, \$300.

*Richard C. Steel*, for Mary L. Keyes.

*Louis Marshall*, for Bignall.

*Held*, That as the cause of action or claim became the property of Bignall, after the commencement of the action, he was liable for the costs included in the judgment entered before the assignment, as well as the costs that subsequently accrued. Code of Pro., § 321; Code Civil Pro., § 3247. The Code in its language embraces the case of one defending an action in the name of the defendant on the record, and of a respondent on appeal. 31 N. Y., 125-6. One taking an assignment of a cause of action after suit brought thereon is liable for all of the costs of the action the same as if he were a party, as well those accrued before as after the assignment. 58 N. Y., 607.

Order reversed, and motion granted.

Opinion by *Haight, J.; Lewis, J.*, concurs; *Bradley, J.*, not voting; *Barker, J.*, not sitting.

## RAILROAD. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL  
TERM. FIFTH DEPT.

Orin Gill et al., admrs, v. The  
Rochester & Pittsburgh RR. Co.

Decided June, 1885.

Plaintiff's intestate was ejected from defendant's train for not paying his fare. He was subsequently found dead in a pool of water by the side of the railroad, having died of suffocation or drowning.

*Held*, That if deceased was so stunned by violence in putting him off, or was so intoxicated to the knowledge of defendant's employees when he was put off, as to be unable to take care of himself, defendant was liable for causing his death.

*Also held*, that there was no evidence to support the charge to the jury that they might, as an item of damages, consider and determine the benefit that would be likely to result to the parents of deceased from the counsel and advice that they might have received from their son all during life.

Motion by defendant for new trial on exceptions taken at circuit and ordered heard at General Term in first instance.

Action to recover damages resulting from the death of plaintiff's intestate.

Deceased was a passenger on defendant's train that left Leroy at about 7:30 on a dark, cold and stormy Saturday evening in February. He did not comply with the conductor's call for a ticket or his fare, the train was stopped and he was put off more than a mile from the station, and about 115 rods from any accessible dwelling house. As the train moved away deceased was seen standing or leaning against the bank of the cut in which he had been left, and he was not seen

again until the following Monday morning, when his dead body was found on the side of the track opposite to that on which he was put off, lying in partially frozen mud and water. The immediate cause of his death was suffocation or drowning. One witness testified that he saw the conductor pulling deceased out of the door. Another, that when the conductor was taking deceased out, the latter was down; "he went out quick" \* \* "he was going on the floor out of the door" when witness first saw him. Another, that she saw deceased as he was going over against the bank; he went as though he had been pushed with force, and he was going with the force that he was propelled with against the bank; "while on the platform he seemed to be perfectly limpsy, and he seemed to be so after that;" while on the platform "I should suppose he was standing; I could see part of his body above the window; he didn't seem to have any government of himself—that is, use of his arms, and his head was lying over in a kind of a limpsy manner; after he fell he laid just as he fell; I couldn't say whether he fell with considerable force or not." Another, that she saw deceased lying on the bank after he was put off; saw him through the car window; he appeared as though he was lying on his back, as she thought; he appeared as though he was asleep; she didn't notice him moving any. Other testimony tended the same way.

*Martin W. Cooke*, for deft.

*Johnson & Dean*, for plffs.

*Held*, That the evidence warranted the charge that if more than necessary force and violence was used in putting deceased off the cars, resulting in the stunning or paralyzing of deceased so that he was incapable of taking care of himself, and because of such incapacity he fell into the pool and was drowned, plaintiffs were entitled to recover.

There was no error in charging that if the incapacity of deceased to take care of himself was the result of his intoxication, the intoxication must have been known to the conductor when he ejected deceased, in order to entitle plaintiffs to recover; or in refusing to charge that if the intoxication contributed in any degree to the inability of deceased to get out of the situation in which he was found, such intoxication is to be attributed to him as contributory negligence, preventing a recovery; or, that if deceased, being under the influence of liquor, fell in the place where he was found, and the influence of liquor contributed to, or aided in producing his inability to get up out of the position, and his death was caused by suffocation or drowning, coupled with such inability, plaintiffs cannot recover.

It was in evidence that the father of deceased is a farmer; that he has a wife, three daughters and two sons; that deceased was in his seventeenth year at the time of his death; that his health was good; that he had always lived with his father except when he worked out by the month in the summer; that

he helped his father on the farm, and had done so since he was large enough to do anything, and that a part of the winter before his death he had attended school in the district where his father lived.

*Held*, That there was no warrant for the charge that the jury might consider, as an item of damage, the benefit that would be likely to result to the parents of deceased from the counsel and advice they might have received from their son all during life. Yet see, 37 N. Y., 287; 24 id., 471; 47 id., 319.

New trial ordered, costs to abide event.

Opinion by *Smith, P.J.*; *Barker* and *Bradley, JJ.*, concur; *Haight, J.*, not sitting.

## REAL ESTATE. CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Charles P. Moody, *applt.*, v. Frederick Gerharts, *respt.*

Decided April, 1885.

A land contract provided, that if the vendee should fail to perform any part of the contract the vendor should have the right to declare it void and retain the payments made, besides all the improvements, and to take immediate possession of the premises, &c. The vendee, after making various payments, left the premises, and the vendor took immediate possession and used the farm as his own, &c. *Held*, That the vendor thereby elected to treat the contract as rescinded, and could not recover for its breach.

Appeal from a judgment entered upon nonsuit at Special Term. The action was brought to re-



cover damages for a breach of contract dated the 16th day of March, 1875, by which plaintiff agreed to sell a farm to defendant for the price of \$2,500; \$100 to be paid down, and the same amount in each year until 1885; and the balance to be paid as provided in the contract. The contract provided, that if the party of the second part shall fail to perform the contract, or any part thereof, the party of the first part shall, immediately after such failure, have the right to declare the same void and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as his tenant, holding over without permission, and may take immediate possession of the premises and remove the party of the second part therefrom. Defendant took possession of the lands under the contract on the 1st of April, 1875, and continued in possession till the 1st day of April, 1879, when plaintiff took possession and defendant left the premises. Defendant while in possession made various payments on the contract, amounting in all to \$350. The evidence on the part of the plaintiff tended to show that defendant had neglected to make certain repairs required by the contract, and was slow and behind time in making payments; that plaintiff requested him to secure the payments by chattel mortgage on personal property, but defendant refused; that defendant made some repairs while in possession

but not to the extent required by the contract.

Defendant quitted possession at the time above stated, leaving three acres of wheat growing upon the farm. Plaintiff immediately took possession, has ever since used the farm as his own, and both parties have proceeded upon the assumption that the contract has ended. No evidence was given on the part of defendant, and the court nonsuited plaintiff.

*J. Welling*, for applt.

*L. M. Norton*, for resp't.

*Held*, That the contract was rescinded and no action could be maintained upon it; the nonsuit was properly granted. 87 N. Y., 463; 6 T. & C., 295; S. C., 3 Hun, 600.

Judgment affirmed.

Opinion by *Corlett, J.*; *Haight* and *Bradley, JJ.*, concur.

## RAILROADS. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Martha J. Parsons, executrix, *resp't.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided April, 1885.

Where the court in charging the jury stated, that it seemed from the evidence that the deceased alighted from the train upon which he was a passenger before it had stopped at the station for the discharge of passengers, and while proceeding to cross the intervening track was struck by a passing freight train; and the jury were left to determine the question of the deceased's negligence upon the theory that he attempted to cross the track before the train had stopped, *Held*, Error to refuse to charge, in substance

and effect, that in such case the company owed no duty to him as a passenger, and he was bound to exercise the same degree of care and vigilance required of persons crossing a railroad track upon a highway.

Appeal from judgment upon verdict and from order denying motion for new trial.

Action to recover for the negligent killing of plaintiff's testator after leaving defendant's cars, upon which he was a passenger, and while crossing the tracks in the direction of the station. As the train entered the station grounds, but before it came to a full stop, deceased stepped off and alighted between the east-bound and west-bound tracks; he then walked at a rapid gait by the side of the train and diagonally across the west-bound track, but before passing the west-bound track he was struck by a freight train going west.

Defendant's counsel requested the court to charge that if Parsons got off the train while in motion, and without looking or listening for approaching trains, passed upon the west track where he was injured, defendant at the time he received such injury owed him no duty as a passenger, and is not liable for breach of duty to him as a passenger. That if, by looking, he could have seen the train approaching and avoided injury, and failed to do so, he is chargeable with contributory negligence. That if he could have seen the approaching train in season to have avoided it, had he looked before attempting to cross, it will be presumed he did not look, and by

omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence. That if he failed to look down the west track before going upon it, he was negligent. The court refused to charge and counsel duly excepted.

The court charged "that the deceased proceeded on the train to Black Rock Ferry station, and there, before the train had stopped, it would seem from the evidence, he alighted from the train and attempted to pass across the westerly track in a diagonal direction towards the hotel (adjacent to the station), and as he stepped upon the westerly track was struck by the locomotive." Respondent did not except to this charge, or request the court to submit to the jury the question as to whether the passenger train had stopped or not prior to the passing of the freight train; and this question was not in terms left to the consideration of the jury.

*Charles B. Wheeler*, for resp't.

*George C. Greene*, for applt.

*Held*, That as the jury were left to determine the question of deceased's negligence upon the theory that he attempted to cross defendant's tracks before the passenger train had stopped to discharge its passengers, upon that theory of the case appellant was entitled to have the requests charged.

Upon a former appeal, this court held that it was not a proper time to leave the train while it is in motion and before defendant had signalled passengers to alight; that the deceased having left the train under these circumstances could

not claim any other degree of care from defendant while he was attempting to cross its tracks than if he had not previously borne to it the relation of passenger; that he was bound under those circumstances to use the same care in attempting to cross the tracks as would be required of a person attempting to cross upon a highway. That the running of the freight train past the station before the passenger train had come to a halt for the discharge of its passengers was not, as a matter of law, a breach of any duty which defendant owed to the deceased as a passenger or otherwise. 17 W. Dig., 479. When a passenger train stops at a station to receive and discharge passengers, it may be assumed that the company will, in the exercise of ordinary care, so regulate the running of its trains as to afford safe ingress and egress to and from its trains to its passengers; and they are not called upon to exercise that degree of vigilance which is required of persons crossing upon a highway.

Terry v. Jewett, 78 N. Y., 338; Brassell v. N. Y. C. & H. R. RR. Co., 84 N. Y., 243, distinguished.

The deceased, in jumping from the train while in motion, before it had stopped for the discharge of its passengers, did so at his peril. He had no right to assume that other trains would not be passing upon the westerly track, and in attempting to cross the same he was bound to use the same vigilance as in crossing upon a highway. But if he continued to walk by the train until it came to a

stand, he, as well as the other passengers, would have the right to assume that no trains would run through the depot so as to endanger the passengers entering or leaving the train, and they would not be bound to exercise the same degree of vigilance required of a person crossing a railroad track upon a highway, who must make a vigilant use of his eyes and ears before crossing. 2 Hun, 536; affirmed in 64 N. Y., 655; 39 id., 358-361; 75 id., 330-332; 79 id., 72-76; 92 id., 658.

Some of the requests to charge were within the precise language of the authorities, and if the rule is to prevail that the deceased was bound to exercise the same vigilance as in crossing upon a highway, these requests were proper and should have been granted. It is contended, however, that the case now differs from the one that was before this court on a former review; that the evidence tends to show that the passenger train had come to a halt before Parsons attempted to cross the tracks and before he was struck. But it does not appear that the case was tried or submitted to the jury upon this theory. Several witnesses testified that the train moved from a half to the length of a coach after the freight train had passed. The only evidence tending to show that this was not so is the testimony that several passengers had got off the train on the depot side when Parsons was struck. About 120 passengers got off at this station, but whether they had stepped from the train before it stopped or

not does not appear. Respondent's witness, when asked if the train had come to a stop when the freight train passed, answered, "I can't testify positively as to that." This is all the testimony tending to show that the train had stopped. Respondent did not except to the charge or request the court to submit to the jury the question as to whether the train had stopped before the passing of the freight train, and this question was not left in terms to the jury for their determination. The jury was called upon to determine the question as to deceased's negligence upon the theory that he attempted to cross the tracks before the train had stopped to discharge its passengers, and upon that theory of the case appellant was entitled to have the requests charged.

Judgment and order reversed and new trial ordered.

Opinion by *Haight, J.*; *Bradley, J.*, concurs; *Barker, J.*, concurs in the result.

#### ATTORNEY'S LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*In re William D. Tuttle, respt.*,  
v. *The Village of Cortland, applt.*

Decided April, 1885.

Section 66 of the Code is not designed to prevent litigants from fairly settling their suits without their attorneys' assent, but simply to protect attorneys from being deprived of their compensation by settlements which deprive them of the means to recover it.

A settlement made in good faith by the parties will not be set aside at the instance of the attorney of one of them where it

appears that the sum agreed to be paid under the settlement to his client exceeds the amount necessary to satisfy his lien, and especially where the opposite party has offered to pay his claim directly to him.

Appeal from order of Special Term.

On Feb. 25, 1884, Mrs. B. recovered judgment against defendant for \$1,500 damages, and \$112.53 costs. Pending an appeal from such judgment and in the absence of her attorney, Tuttle, Mrs. B. entered into a written contract with defendant by which the latter agreed to withdraw its appeal and to pay her \$1,112.53 in settlement of the judgment and cause of action as soon as the money could be levied and collected, and she agreed to cancel the judgment on receipt of said sum.

Tuttle, who claims a lien for the costs and for \$130 costs since entry of judgment, counsel fees and disbursements, moved at Special Term for an order setting aside the settlement and allowing the action to be continued for the collection of his charges. Before said motion was argued defendant served a written offer to pay Tuttle any sum which might be found due him from his client on account of his services and disbursements, to be deducted from the amount agreed to be paid to Mrs. B., and on the argument offered to set aside the settlement and restore the parties to their original positions and rights, which offers were not accepted.

The Special Term ordered the settlement set aside unless defendant paid Tuttle the costs recovered

in the judgment and \$130 in addition within ten days.

*Irving H. Palmer*, for applt.

*William D. Tuttle*, resp't. in person.

*Held*, Error. It is difficult to see how the attorney's lien or rights are imperilled by the settlement. He claims but \$243.53, and the amount agreed to be paid, but not yet paid, is \$1,112.53, upon which the attorney has a lien. Code Civ. Pro., § 66. The good faith of the settlement is not impugned, and plaintiff has not moved to set it aside.

Section 66, Code Civ. Pro., which gives an attorney a lien upon his client's cause of action or judgment for his compensation, is not designed to prevent litigants from fairly composing and settling their suits without the assent of their attorneys, but simply to protect attorneys from being deprived of their compensation by settlements which deprive them of the means to recover their compensation.

This settlement did not release or impair the attorney's lien upon the judgment, enough of which defendant agreed to pay to much more than satisfy the amount claimed by the attorney; and more, defendant offered to pay the attorney's claim directly to him within five days after its amount should be established by agreement with his client or otherwise. That this was all he was entitled to, and this he should have accepted.

Order reversed, with costs and disbursements, and motion denied, with costs.

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Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

## OFFICIAL NOTICES. PUBLICATION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. Edward M. Cole v. Frederick Hill, County Treasurer.

Decided May, 1885.

What publication should be given to the appointments of the terms of court is fixed by the legislature, and this court cannot enlarge the terms of the statute.

This was a proceeding to compel payment for publication in the *Windham Journal* of the terms of the Supreme Court and Courts of Oyer and Terminer, and of the General Terms of the Supreme Court in the Third Department. An order was made at chambers by a justice of the Supreme Court in 1878 directing the publication for one year and thereafter weekly until further order of the court; it also directed the clerk of Greene county yearly to give the publisher a certificate of the amount due him for such publication, which was ordered to be paid by the county treasurer out of the moneys raised in said county for court expenses. The only publication of these appointments directed in the Code of Civil Procedure seems to be §§ 226 and 233. At Special Term a peremptory mandamus was granted.

*James B. Olney*, for applt.

*Hallock, Jennings & Chase*, for resp't.

*Held, Error.* The order enlarges the terms of the statute, which provides for the publication of the terms of courts. Section 3317 fixes printers' fees, and these fees are for advertisements required by law to be published. The publication to be given these appointments properly comes within the scope of the legislative power, and not within the judicial power. No case is presented here involving the inherent power of the court, when in session, to incur such expense as may be necessary in certain exigencies to maintain its authority, punish offenders, and prevent the miscarriage of justice.

Order reversed.

Opinion by *Landon, J.*; *Learned P. J.*, and *Bockes, J.*, concur.

#### MASTER AND SERVANT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Mary McCall, adm'rx., *respt.*, v. Silas H. Witherbee et al., *appls.*

Decided May, 1885.

The inspection of the roof of a chamber in an iron mine in which men are at work is the duty of the master, and he must employ persons for such inspection who are faithful and competent. And where a portion of the roof fell and killed an employe, although defendants regarded the inspection made sufficient, it is still a question for the jury whether it was so.

Plaintiff's intestate while working for defendants as a laborer in their mine was killed by a rock falling from the roof. He was working in a chamber which was about thirty feet high. It is the custom in such mines that the roof

should be carefully inspected by a competent inspector, and that if any loose rock is detected it be trimmed or pried off. The liability of rock to fall depended somewhat upon whether the rock was seamy and somewhat upon the amount of blasting done at the head of the mine. The inspection was done by competent men, and it was claimed with sufficient frequency. But the rock was full of seams, and there was some conflict of evidence upon the sufficiency of the inspection. Plaintiff had a verdict.

*M. D. Grover*, for *appls.*

*R. L. Hand*, for *respt.*

*Held*, That the inspection was the work of the master. 88 N. Y., 225. Servants and workmen may do it, but they are doing master's work; they must do it carefully and well; if they do it negligently it is the negligence of the master, for which he is liable. If loose rock exists it must be removed. The order for the removal is the work of the master; the removal itself is an executive detail and is servant's work. There seems to be no reason to question the competency of defendants' foreman, who gave orders for the inspection, and he no doubt inspected the roof as often, in his judgment, as was necessary. But it still remains a question of fact within 88 N. Y., 225, whether, after all, the foreman was sufficiently careful. We cannot say that fair minds might not reach the conclusion that he was not.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned P. J.*, and *Bockes, J.*, concur.

### CONTRACT. SALE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John W. Brigham et al., *respts.*,  
v. William T. Fish, *applt.*

Decided June, 1885.

By accepting and retaining goods sent to him by plaintiff accompanied by a bill for the same stating that the goods were bought by defendant of plaintiffs and giving the terms of credit, *Held*, That defendant ratified the terms of such bill of sale, although he had paid plaintiff's traveling salesman for the goods at the time of giving the order, such salesman not being authorized to receive payment for plaintiffs.

Appeal from order of Special Term, denying motion for new trial on a case.

Action to recover the price of a bill of goods. Plaintiffs were Boston merchants. Defendant was a merchant in Salamanca. One S. was authorized by plaintiffs to take samples of their goods and obtain orders for them on commission. He had no authority to receive pay for goods ordered through him. In June, 1877, S. went to defendant's store and it was arranged between them that S. should sell defendant a bill of goods and take his pay in goods from defendant's store. S. had no goods with him but the samples, nor did he deliver any goods to defendant at the time. Defendant made a memorandum of the goods he wanted, and S. sent plaintiffs an order for them containing the words, "Terms, four months."

At the time of the arrangement defendant sold and delivered to S. goods which, with a bill owing to defendant by S. for goods theretofore bought, amounted to the price of the goods specified in defendant's memorandum. Plaintiffs, on hearing from S., shipped a part of the goods ordered to defendant, and at the same time mailed to him a bill of the same, dated, "Boston, 25 June, 1877," with the following heading: "W. T. Fish bought of T. W. Brigham & Co., manufacturers of hand-made boots and shoes, 114 Pear St., Boston." On the margin of the bill was printed, "Terms, 4 months or 4 per cent. off if paid in thirty days." In August S. was at defendant's store and defendant asked him why the bill was not receipted. S. said it would make no difference; that he had authority to receipt it; and he then did so in plaintiff's name. At maturity of the bill plaintiffs sent it to defendant requesting payment. He answered that he paid for the goods when he bought them. Thereupon plaintiffs advised defendant that S. had not reported to them; that they would write to him and ascertain. After some further correspondence this suit was brought.

*W. H. Henderson*, for *applt.*

*W. G. Laidlaw*, for *respts.*

*Held*, That by accepting and retaining the goods, without advising plaintiffs of his arrangement with S., defendant ratified the terms of the bill of sale and became liable to plaintiffs for the price of the goods delivered. If he did not intend that

result good faith required him at once to notify plaintiffs of his arrangement with S., and that he claimed to hold the goods as purchaser from him. As between plaintiffs and defendant, it is, in legal effect, as if the bargain with S. had not been made.

Plaintiffs cannot be said to have ratified the agreement made by S. because they were not advised that the alleged payment to S. was in goods sold out of defendant's store, and for a part of which S. owed defendant at the time of the arrangement.

Order affirmed.

Opinion by *Smith, P.J.*; *Barker* and *Bradley, JJ.*, concur.

### WILLS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*In re accounting of executors of George Nanny, deceased.*

Decided May, 1885.

The will of testator provided that on the death of his widow his estate should be divided into five equal parts, one of which he gave to his executors in trust for his son; it then provided as to three of his children, "the other equal one fifth part thereof to" the son or daughter respectively, "and if she (or he) leaves no child or children surviving then to pay the same to my other children herein named or their heirs or representatives;" as to the other daughter there was a similar provision omitting the word "no." *Held*, That the ownership and power of disposition over their shares by all of the children except the first named was not absolute, but conditional; that it was the intention of testator that the possession and control of said shares should be given to the children named personally to be held to await

the event on which absolute ownership depended; that his children were all to be equally provided for, and that the word "no" should be inserted in the last provision.

Appeal from decree of surrogate on accounting.

Testator by his will gave to his wife absolutely his dwelling house and lot and the use of all the rest of his property for life. After her death he directed what remained to be disposed of and the proceeds to be divided into five equal parts, one of which he gave to his executors for his son L., the interest and income thereof for the support and maintenance of himself and family during his life and so much of the principal to his use as the executors deem proper, and at his death to pay the principal to his children if any, and if not to testator's other children equally or to their heirs or legal representatives.

"The other equal fifth part thereof to my daughter Susan, and wife of G. A. S., and if she leaves no child or children surviving her, then to pay the same to my other children hereinafter named or their heirs or representatives." The same provision was made as to his children, Sarah and Albert.

"The other remaining equal one-fifth part thereof to my daughter Emily, wife of L. M., and in case she leaves child or children surviving her then to pay the same to my children above named share and share alike or their legal representatives."

On the final settlement it appeared that Sarah and Emily were



dead, and the surrogate by his decree directed that the shares of Susan and Albert be retained and invested by the executors and the annual income thereof paid to them respectively during their natural lives and at their death or the death of either that the share of the one so dying be paid to his or her children equally, share and share. The decree also provided that the bequest to Emily should be construed as if it read "and in case she leaves no children," and directed her share paid to the guardian of her children.

From these portions of the decree this appeal is taken.

*John G. Wilkin*, for appls.

*W. F. O'Neill*, for respts.

*Held*, That although the language employed in the will to express the primary gift to each child of testator imports an intention to make an absolute bequest, yet the subsequent provision that if they leave no child surviving them the part was to be paid to the other child or children of testator named in the will or their heirs limit sand controls the provision, and the fact that the fund or share so bequeathed was limited to pass over to the other children in the event contemplated implies that while the result remained uncertain the title of the legatee was only conditional and the property was locked up during the time that the contingency might happen. But there is no offense to our statute against perpetuities because the devise is limited to take effect on the failure of issue at the time of

the death of the first taker. That is a definite failure of issue because a precise time is prescribed therefor less than the period permitted by our statute and the persons who are to take are specified. It is a limitation engrafted on an absolute bequest and at the Common Law would be an executory devise. With us, however, the distinction between executory limitations of real and personal property are destroyed by the Revised Statutes, 1 R. S., 724, §§ 23, 24. Both contingent remainders and executory devises are now classed as expectant estates. It seems to follow, therefore, that the fund or portion bequeathed to testator's children cannot pass to them absolutely while the event on which their estate is limited remains contingent. It also appears that their ownership and power of disposition is not absolute, but conditiona and dependent on the contingency provided. But where is the fund or portion to vest after the death of the widow? It was within the competence of testator to confide the same to the first takers and trust to them to preserve the fund to await the event on which depended its absolute ownership, 64 N. Y., 289, and we think his intention to do so in this case may be deduced from the will. The share of testator's son, L., is to be held by the executors for the support of himself and family during his life, but no provision is made for the custody and control of the part of any other child. On the contrary the general language of the bequests is "the one equal

fifth part thereof to my daughter" or son, as the case was. We think this evinces the intention of the testator to give the possession and control of the parts of all the children except L. to them personally. If it had been the intention or expectation of testator that at the death of his widow the estate would be divided into five parts for his five children and that all would remain in the hands of his executors to await the time of the happening of the contingency named in the will and the income only paid over to his children, then he would not have made the special provision in relation to the share of his son L., because it would have been a work of supererogation.

*A'iso held*, That the insertion of the word "no" in the bequest to Emily seems to be in conformity with the intention of testator to be deduced from the language and tenor and the scope and object of the whole will. The scheme of the whole will is to bestow a life estate on the widow of testator and at her death to divide the property into five parts and give each of his children one-fifth with the limitation we have stated, and his children were to be equal, and that intention can only be perpetuated by inserting the word "no" as the surrogate has done.

Decree modified so as to direct payment to each appellant of one-fifth of the property, and as modified affirmed.

Opinion by *Dykman, J.; Barnard, P.J.*, and *Pratt, J.*, concur.

## HUSBAND AND WIFE. CREDITOR'S ACTION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

John G. Harbottle et al., *appls.*,  
v. John Farrell et al., *respts.*

Decided April, 1885.

Where a husband owes his wife for money earned by her before marriage he has a right to secure her for it, and where such debt exceeds the value of his interest in land which he conveys to her the fact that other money earned by her after marriage was applied in payment of its purchase price is immaterial to affect the validity of the deed.

Appeal from judgment of Special Term in favor of defendants.

Action to set aside a conveyance made by John Farrell through a third party to his wife as fraudulent and void as against plaintiff, a creditor of the husband.

At the time the debt to plaintiff was contracted Farrell was in possession of a house and lot under contract, for which he agreed to pay \$800. It was conveyed to him Jan. 9, 1875, and he gave back a mortgage for \$575, the amount unpaid. October 13, 1879, when \$400 remained unpaid, Farrell conveyed the premises to one T., and the latter conveyed to Mrs. F. subject to the mortgage; both conveyances being without consideration. Mrs. F. sold part of the lot, mortgaged the remainder, and with the proceeds paid off the mortgage.

Plaintiff commenced this action Aug. 29, 1879, and recovered judgment Feb., 1881, on which execution has been issued and returned unsatisfied.

Defendants both testified that Mrs. F., at the time of the marriage in December, 1859, had \$500, which she loaned or advanced to John. A witness testified that in 1865 he saw her hand it to her husband. Mrs. F. testified that this money was earned by her at service and specified the places at which she worked, and on cross-examination that this money had never been in bank or invested, but had been kept about her person and house, and that her husband did not know she had it until some three years after marriage. The trial court found that the wife had and loaned this sum to her husband.

*Hannibal Smith*, for applts.

*Porter & Walts*, for respts.

*Held*, That judging from the printed evidence, as an original proposition, we might be inclined to doubt the truth of this evidence, but having been found to be true by the trial court we do not think that this court ought to disturb the finding. This sum, at simple interest, amounted to more, at the date of the conveyance to Bridget, than the value of the interest of John Farrell in the premises as found by the court, and certainly this finding is abundantly sustained by the evidence.

Defendants also testified that Bridget had earned and saved during their marriage \$350 in washing for third persons, some of the work being performed in the house of the Farrells and some of it at the houses of the persons for whom she washed, and that this money was applied in paying for the pur-

chase price of the place. The court found this evidence to be true. Plaintiff insists that as a matter of law this money belonged to the husband and that the court erred in sustaining the deed in part upon this consideration.

*Held*, That the fact that the husband owed his wife on account of the \$500 loan more than the value of his interest in the place renders this question quite immaterial. If the husband owed the wife \$500 for money earned before her marriage he had a legal right to secure her for it.

*Also held*, That no error was committed in ruling upon the admissibility of the evidence of defendants taken in proceedings supplementary to execution. The court ruled that the evidence so taken was not competent against the wife except in so far as it contradicted the evidence of the husband on the trial, and refused to admit the evidence of the wife offered "as a whole," and required counsel to specify the parts that he offered, and the case does not show that any of the parts specified were excluded.

Judgment affirmed, with costs.

Opinion by *Follett, J.*; *Hardin, P. J.*, and *Boardman, J.*, concur.

## JUDGMENT. CONSIDERATION.

### N. Y. COURT OF APPEALS.

Russell, rec'r, *respt.*, v. Nelson et al., *applts.*

Decided May 5, 1885.

A corporation having bid in certain prop-

erty on foreclosure and entered judgment for deficiency, subsequently agreed with the mortgagor to make him a new loan and to reconvey said property to him and satisfy the judgment on his giving a mortgage on it for the deficiency and one on other property for the loan, which agreement was carried out and a satisfaction of the judgment executed but not delivered. In an action to foreclose the last mentioned mortgage it was set aside for usury. *Held*, That the company was thereby deprived of the only consideration for its agreement to satisfy the mortgage; that the judgment was thereby revived, and that the satisfaction should be surrendered by the holder to the representative of the corporation.

This action was brought to restrain defendant J. from delivering to defendant L. a satisfaction piece of a judgment in favor of the Knick. L. Ins. Co. against N., and to compel the delivery of said satisfaction piece to plaintiff, and to declare said judgment to be in full force and effect. It appeared that in 1871 said insurance company loaned to N. \$17,000 on a mortgage on property in Ulster county. In 1873 it foreclosed the mortgage and bid in the property for \$7,000, and entered a judgment for deficiency against N. for \$11,160.65. In 1874 N. agreed with one H. to purchase certain property in Brooklyn, and applied to said insurance company for a loan. It still owned the Ulster county property. It was agreed that it should convey said property to N., and N. was to give bonds secured by mortgages to the amount of \$70,000 on the Brooklyn property, and a mortgage for \$10,000 on the Ulster county property, the company agreeing to loan N. \$70,000 and satisfy said judgment. The mort-

gages given by N. on the Brooklyn property were foreclosed, N. setting up usury as a defense, and they were finally declared usurious and void. In 1875 a foreclosure of the mortgage on the Ulster county property was commenced, and the company obtained a decree for \$11,030.62. The property was sold in June, 1876, and bid in by the company for \$2,000. The satisfaction of the deficiency judgment was not recorded, but was discovered by J. among his papers.

*N. C. Moak*, for applt.

*James A. Dennison* for respt.

*Held*, That N., in having set aside the mortgages on the Brooklyn property, deprived the company of the only consideration for its agreement to satisfy the deficiency judgment, and the judgment setting aside said mortgages operated to revive the debt represented by the deficiency judgment. As the satisfaction piece, though executed, has never been delivered, it should be surrendered to plaintiff. 56 N. Y., 214; 64 id., 294.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

#### ATTACHMENT. ESTOPPEL.

##### N. Y. COURT OF APPEALS.

*Almy et al., applts., v. Thurber et al., respts.*

Decided June 23, 1885.

The only essential part of a certificate given by one possessing property of a debtor against whom an attachment has been

issued is that showing the balance due to him; the dates and items of the account are admissions which may be used as evidence, but are open to explanation, and the person giving it is not estopped from showing a mistake as to them.

Affirming S. C., 17 W. Dig., 89.

This action was brought by A. & Co., joined with the sheriff of New York, pursuant to § 677 of the Code of Civil Procedure, to recover from defendants property in their possession attached by said sheriff in an action by his co-plaintiffs against G. & Co. The attachment against G. & Co. was served on defendants May 10, 1881, and a certificate as to property or money in their hands belonging to G. & Co. demanded. Defendants responded on the 28th of May by an account current, showing a credit balance of \$120.95. They credited G. & Co. with \$2,003.63, as of April 26th, and charged them with cash, May 10th, \$20, and merchandise, May 13th, \$1,882.48. Defendants proved that the merchandise charged had been sold and delivered to G. & Co. by them some time prior to May 13th. Plaintiffs claimed that defendants were estopped by their statement from showing the above facts, as the sheriff, relying upon it, had after receiving it made no further effort to find property subject to attachment.

*Samuel Hand*, for appls.

*E. C. More*, for respts.

*Held*, Untenable; that the only essential part of the account rendered by defendants was that showing the balance; that the other items were admissions, which could in a proper case be used as evidence, but which were open to ex-

planation. The dates and items of the statement might suggest error in the balance certified to, and so lay the foundation for an examination of defendants, Code, § 651, but nothing more.

Judgment of General Term, affirming judgment for plaintiffs for \$120, affirmed.

Opinion by *Danforth, J.* All concur.

### HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

*Griffith Jones v. George Chamberlin et al.*

Decided April, 1885.

Where the commissioners of highways divided the town into road districts and located defendant's land as in district No. 15, and duly filed the instrument, but said land was subsequently assessed for highway labor in district No. 16, and was sold and conveyed by the comptroller to plaintiff for non-payment of the taxes assessed for such labor, *Held*, That it will be presumed that said land was located in that district when the assessment for highway labor was made; that said commissioners had subsequently made another order dividing the town into road districts and located said land in the latter district.

The omission of the \$ mark before the figures under the headings "total value" and "tax," does not invalidate the assessment roll where it is evident that the figures were used to represent dollars and cents, and nothing else.

Motion for a new trial, after verdict in favor of plaintiff, on exceptions ordered to be heard in the first instance at General Term.

Action to recover possession of land, plaintiff claiming title under a tax sale made in 1871 for delin-

quent and returned taxes of the years 1863, 1864 and 1865, for state, county and highway purposes. Defendants claimed that the highway taxes were erroneously laid, and all subsequent proceedings void. It appeared from a record from the town clerk's office that in February, 1859, the commissioners of highways divided the highways into road districts, and that the district in which the lands in question were located was numbered "15." But it appeared from the assessment roll, the return made to the supervisors by the overseers of road districts, the road warrant issued to the overseer, and the return of the overseer thereto, that the land was assessed as being in road district number 16. No evidence was given that the road district had ever been changed or altered by order of the highway commissioners. Defendant claimed that the legal presumption was that the original order remained unchanged until the contrary appears.

*J. F. Parkhurst, for plff.*

*D. H. Bolles, for defts.*

*Held,* That as the commissioners of highways issued their warrant in each of said years to the overseer of road district number 16, assessing the land in question for highway labor, it must be presumed that the lands at that time were located in that district; that some order had been made dividing the town into districts subsequent to the order of February 8, 1859.

The statute makes it the duty of the commissioners to divide their respective towns into so many road

districts as they shall judge convenient, by writing, under their hands, to be lodged with the town clerk and by him to be entered in the town book; such division to be made annually, if they shall think it necessary, and in all cases to be made at least ten days before the annual town meeting. That they shall assign to each of the road districts such of the inhabitants liable to work on highways as they shall think proper, etc.

The overseers of highways are required, in each year, to make out and deliver to the supervisor of his town a list of all resident land holders residing in his district and who have not worked out their highway assessments; also a list of all the lands of non-residents on which the labor assessed has not been performed or commuted for; which list shall be accompanied by the affidavit of the overseers, etc. It is made the duty of the supervisor of the several towns to receive the list of the overseers when delivered to him, and to lay the same before the board of supervisors. The board is required, at their annual meeting in each year, to cause the amount of such arrearages of highway labor to be levied on the lands of all residents and non-residents against which they were returned.

The commissioners first divide the highways into districts, and then issue warrants to the overseers appointed in the several districts. The latter require the persons assessed to perform the labor upon the highway; and as to those who do not perform he makes his re-

turn under oath to the supervisor, who presents the same to the board, and the tax is levied against the lands. Each of these officers is presumed to have done his duty and to have done it correctly until the contrary appears; besides, the comptroller's deed is made presumptive evidence of the regularity of the preliminary proceedings.

It appeared from the assessment rolls that under the head of "total value," in 1863, are the figures "720" opposite the lot in question, and carried out against it under the heading "tax" are the figures "8, 50." And also in highway district numbered 16, under the head "total value," are the figures "900;" and carried out against it under the heading "taxes," the figures "2, 81." In one of the rolls the tax was expressed in figures "15 31," there being no period or comma between the figures 15 and 31, but a space double that found between the other figures; and in all the rolls the columns were footed up and the total amount expressed in dollars and cents. Defendant claimed that, as there was no dollar mark to indicate what the figures were intended to represent, the rolls were fatally defective and the tax void.

*Held*, That it was evident from the assessment rolls that the figures were intended to represent dollars and cents, and the omission of the \$ mark was not fatal.

In Illinois, Indiana and California the omission of the \$ mark was held to be fatal; but in more recent decisions in New Hampshire, Nevada, Michigan, Nebraska and Mis-

souri, it has been held otherwise; that the figures under the headings "Total Value" and "Tax" must be understood to mean dollars and cents. In 61 How., 315, it was said that where the valuation in an assessment roll is expressed in figures merely, without any \$ sign or mark, the assessment was void. The case was disposed of upon other grounds, and this question was not discussed. The same court held, in 32 Hun, 121, that the omission of the \$ sign did not invalidate the assessment; and this case was affirmed in 96 N. Y., 670. If the figures are so placed upon the roll that it is apparent what they were intended to represent, the roll should be permitted to stand. See 20 Ill., 338; 52 N.H., 525; 76 Mo., 263; 46 Mich., 528; 8 Nev., 15-25; 9 Neb., 374.

New trial denied, and judgment ordered upon the verdict.

Opinion by *Haight, J.*; *Smith, P.J.*, and *Barker, J.*, concur; *Bradley, J.*, not sitting.

## SEDUCTION.

### N. Y. COURT OF APPEALS.

Lawrence, *respt.*, v. Spence, *applt.*

Decided June 26, 1885.

A cause of action by a parent for the seduction of his child is made out by proof that the girl was debauched without his consent, which resulted in a loss to him of her services, whether defendant accomplished his purpose by promises, artifice, flattery or violence.

Affirming S. C., 16 W. Dig., 814.

This action was brought by plaintiff to recover damages of de-

fendant for the alleged seduction of his daughter, a minor. The facts in the case were not controverted, no evidence being introduced by plaintiff on the trial. The jury found that plaintiff's daughter was debauched by the defendant without her father's consent, and rendered a verdict for \$3,000 damages for plaintiff.

*R. A. Parmenter*, for applt.

*Henry A. Merritt*, for resp't.

*Held*, That the case was properly submitted to the jury; that the fact that the girl was debauched without her father's consent, which resulted in a loss to him of her services, answered the fiction of the common law.

Whether the debauching was preceded by much or little or no persuasion, but simply force, is a question with which an appellate court has no concern. Whether defendant prevailed by false promise or artifice, by flattery or violence, a cause of action was made out.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

#### MORTGAGE. PRIORITY. DOWER.

N. Y. COURT OF APPEALS.

*Pope, resp't., v. Mead, impl'd, applt.*

Decided May 5, 1885.

Where, upon partition, the widow, whose dower had not been admeasured, released her dower and received therefor a bond and mortgage on a portion of the lands in suit in ignorance of a prior judgment

against one of the mortgagors, *Held*, That her equities were the same as if she had conveyed lands and taken back a purchase-money mortgage, and that the mortgage was prior in lien to that of the judgment.

This was an action for the foreclosure of a mortgage. The following facts were proved :

In 1856 one R. died intestate, leaving the plaintiff, his widow, and three children, H., C. and J., his only heirs at law. At the time of his death he owned the mortgaged premises. Plaintiff's dower was never admeasured. In 1873 one M. recovered a judgment against J., one of R.'s children, which was docketed and became a lien upon his third of said premises. In 1874 a voluntary partition of R.'s real estate was made between the heirs, and the mortgaged premises fell to C. and J. Plaintiff released her dower in all the property left by R., and received therefor and for other matters settled the bond and mortgage in suit, executed by C. and J. All parties were then ignorant of the lien of the M. judgment. M. claimed that the lien of his judgment was prior to that of plaintiff's mortgage.

*Josiah T. Marean*, for applt.

*George H. Fisher*, for resp't.

*Held*, Untenable; that plaintiff stands upon precisely the same equities as if, instead of assigning or releasing her dower interest, she had conveyed lands and taken back the mortgage for the purchase-money thereof, in which event the lien of her mortgage would have been paramount to that of M.'s judgment. 15 Johns.,



477; 3 Barb., 643; 3 Wend., 233; 45 Barb., 317; 9 N. Y., 483.

Plaintiff's dower right was an absolute right, which is assignable. 87 N. Y., 153.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

*Per curiam* opinion. All concur.

### EXECUTION.

#### N. Y. COURT OF APPEALS.

Reid, *applt.*, v. Stegman, sheriff, *respt.*

Decided May 8, 1885.

An execution against the members of the Board of Commissioners of Charity of the County of Kings, naming them "as" such board, is unauthorized and void, and the sheriff can refuse to execute it, although regular on its face.

This is an action against defendant for failure to return an execution, and for violation of duty imposed upon him by § 102 of the Code of Civil Procedure, requiring the sheriff to execute and return the execution issued to him. The action in which the execution in question was issued was brought against plaintiff herein in the name of H. S. & R., "as the Board of Commissioners of Charities of the County of Kings." The title of the plaintiffs as contained in the summons and complaint, and a reference to the statute under which the action was commenced, and all the facts connected therewith, show that the action was intended to be, and in fact was, an action by "the Board of Commissioners of Charities and Cor-

rections of the County of Kings," a corporation authorized to sue and be sued by that name. A judgment in favor of plaintiff for his costs was entered and docketed against S. H. & R., "as the Board of Commissioners of Charities of the County of Kings."

John H. Bergen, for *applt.*

William Sullivan, for *respt.*

*Held*, That plaintiff could not maintain this action; that the judgment and docket did not authorize an execution against S. H. & R. individually, and hence, although the execution was regular on its face, it was in fact unauthorized and void, and the sheriff could refuse to execute it.

Judgment of General Term, dismissing complaint, affirmed.

*Per curiam* opinion. All concur, except Ruger, *Ch.J.*, Rapallo and Andrews, *JJ.*, not voting.

### NEGLIGENCE.

#### N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Thomas Cahill, *respt.*, v. Henry Hilton et al., *appls.*

Decided May, 1885.

Plaintiff, who was in defendants' employ, was directed to disconnect a belt and hang it up for repairs, a feat which he had often done before. He found the ladder in position, looked to see if it was all right, ascended and endeavored to seize the belt, which was revolving rapidly, became unconscious, and was found on the floor with his arm torn out and the ladder broken. No one saw the accident. *Held*, That it could not be said as matter of law that he was guilty of such negligence as to bar a recovery; that the question was one for the jury.

Appeal from judgment in favor of plaintiff entered on verdict.

Action to recover for personal injuries received by plaintiff while employed by defendants in the gig room at their carpet factory.

Plaintiff was directed to disconnect a belt from the shafting and hang it up for repairs, which was to be done by ascending a ladder with iron hooks at the upper end resting in a guard and catching the revolving belt and throwing it on two spikes in the beam overhead. He had often done this before. After receiving the order, plaintiff went to the place designated to perform it, found the belt detached from the gig, but dangling from the shaft and revolving rapidly, and the ladder in position; after looking to see if it was all right he ascended the ladder, placed his right arm around the beam and endeavored to reach the belt with his left hand and failed; he then braced himself and made another effort to do so and remembered nothing more until his return to consciousness some days later. He was found by another workman on his back on the floor, with his left arm torn off and lying several feet from him, and the ladder broken and lying partly on top of him. The ladder was broken near where plaintiff had stood on it. No eye witnessed the accident.

Plaintiff claimed that the ladder was defective and gave way, precipitating him against the belt and so caused the accident. Defendants claimed that plaintiff was caught by the belt and driven through the ladder, breaking it.

Plaintiff introduced proof tending to show that the ladder was insufficient; that it had been in use for fifteen years, had been broken and repaired and that the rungs were not in order.

The court charged the jury that "if plaintiff thought it dangerous to go up and throw off this belt while the machinery was in motion he should have left the employment or declined to obey the order; but he cannot complain of that because the danger, such as it was, was patent \* \* How did this accident occur? If it occurred because plaintiff caught his arm or hand in this belt and it continued to drag him over until it cast the ladder down and tore his arm from him, then it is apparent that there is no cause of action made out for plaintiff. \* \* But if, on the other hand, the ladder did not break because he was caught in the belt, and he was caught in the belt because at the time he was trying to reach it the ladder broke and threw him off his balance, then, if that occurred through negligence on the part of the defendants in providing him an unsafe ladder, plaintiff is entitled to recover unless his own negligence contributed to the accident;" that they must determine whether the ladder broke and whether defendants were careless in not seeing it was safe, and if they were not careless, then, even though the ladder was defective, the verdict must be for defendants; that if defendants were careless, yet plaintiff was bound to take ordinary care to protect himself. "If the ladder was defective and he

knew or should have known of its defective condition as well as defendants, then that would prevent a recovery."

The jury found a verdict for plaintiff.

Defendants now claim that plaintiff should have ascertained the capacity and strength of the ladder, and that it was weak and dangerous, and that his omission to do so furnished sufficient evidence of contributory negligence to defeat his recovery.

*Wm. J. Thorn*, for appls.

*Austen G. Fox*, for resp't.

*Held*, That it cannot be said as matter of law that the attempt of plaintiff to obey his order and throw up the belt on the spikes was such negligence as precludes a recovery. He had performed the same feat a number of times before, and although he knew it required care and regarded it as dangerous to take the belt off the pulley and put it on the nails when the machinery was in operation, yet he knew it was practicable and had been accomplished many times. Nothing in his manner of proceeding indicated want of care, and it is a violent presumption to assume that he went heedlessly into danger. It would be far more consonant with human nature to assume that when plaintiff ascended the ladder and undertook to lift the belt on to the nails he thought it could be accomplished with safety, and he said in his testimony that he did not know as he feared the belt might injure him. It must now be remembered that the jury have found the accident resulted from

the defective ladder, and it is fair to assume that he depended on the ladder as sufficient to endure the strain it must receive when he braced himself on it to reach for the revolving belt. He said in his testimony that he never noticed any defect in the ladder and that it seemed to him to be good and sound. We find no evidence of contributory negligence that will bar a recovery. The whole question was for the jury, and it was fairly laid before that body.

*Also held*, That the exceptions to the refusals to charge present no error. The charge was as full and fair as defendants could require.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Pratt, J.*, concurs; *Barnard, P. J.*, dissents.

## TAXATION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Adon Smith, *resp't.*, v. Commissioners of Taxes, *appls.*

Decided May 8, 1885.

The committee of the property of a lunatic is a trustee within the meaning of 2 R. S., 7th ed., 789, § 5, and 991, § 10, and the property of the lunatic in his hands is taxable under said statutes, and such property cannot be considered to be in *custodia legis* and therefore non-taxable.

Appeal from an order made at Special Term, cancelling an assessment.

Relator was the committee of the person and property of one S., a lunatic, and was assessed by the

Tax Commissioners with respect to the personal property held by him as such committee in the sum of \$160,000. This assessment was made under the authority of 2. R. S. (7th ed.), 989, § 5, and 991, § 10, authorizing the assessment of every person for "all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator." It was claimed by relator that the personal property of the lunatic was non-assessable, for the reason that he as committee was only an officer of the court and that the property was in *custodia legis*.

*Albert L. Cole*, for applts.

*William Man*, for respt.

*Held*, That if the relator, as a committee, was a trustee within the purview of the statutes, *supra*, the assessment was proper, and that it has been held that a committee not only has the legal title to the personal property of the lunatic, but that he is holding the estate in trust under the directions of this court, and further, that he is a trustee of an express trust. 5 Hun, 170; 7 Johns. Ch., 139; 14 Barb., 499; 56 id., 201; 2 Hun, 401.

That the contention that the court being the trustee the committee is only the representative of the court and therefore the fund in *custodia legis* and unassessable was not supported by any of the adjudications.

*In re Kellinger*, 9 Paige, 62, distinguished.

Order reversed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

## FORECLOSURE. SUBMISSION.

### N. Y. COMMON PLEAS. GENERAL TERM.

*Henry T. Crosby v. George A. Thedford.*

Decided April 13, 1885.

The court at Special Term has no right to grant an order for service of summons by publication under § 440, Code.

In case of the submission of a controversy without action, under the Code, the court is confined to the facts agreed on, and can make no inferences, or in any way depart from or go beyond the statement presented.

Submission of case to General Term upon agreed facts.

Plaintiff sought specific performance of a contract for the purchase and sale of real estate. Defendant refused, on the ground that plaintiff could not give good title.

Plaintiff acquired title under a sale in a foreclosure action, in which some of the defendants were served under an order for publication made by the Special Term of the Supreme Court, although signed by a judge thereof.

*S. W. & H. W. Gaines*, for plff.

*D. L. Walter*, for deft.

*Held*, That the court at Special Term has no power to make such an order. Code, § 440; 12 W. Dig., 99; 77 N. Y., 278. Were it not admitted in the case that the order was made at Special Term, the caption of the order might be disregarded, and the order regarded as within the requirements of § 440, Code. But the court is confined to the facts agreed on and can make no inferences, or in any

way depart from or go beyond the statement presented. 55 N. Y., 486.

Defendant should be relieved from his contract.

Judgment for defendant.

Opinion by *Larremore, J.*; *Daly* and *Van Hoesen, JJ.*, concur.

### COUNTERCLAIM. SPECIFIC PERFORMANCE.

#### N. Y. COMMON PLEAS. GENERAL TERM.

William Moser, *applt.*, v. Thomas B. Cochrane, *respt.*

Decided April 13, 1885.

In an action by the vendee to recover money paid by him on a contract for the purchase and sale of real estate, the vendor may plead proper facts and pray for a specific performance of the contract, and this will constitute a counterclaim under § 501, Code, which counterclaim may, after dismissal of the complaint, be sent to the equity term for trial.

Appeal from judgment in favor of defendant on counterclaim.

The action was brought to recover \$1,000 paid by plaintiff to defendant on a contract for the purchase of real estate. The answer admitted the allegations of the complaint except as to legal results, and prayed specific performance of the contract.

The complaint was dismissed, and the counterclaim ordered to stand over for trial at the next equity term, and was so tried and resulted in a judgment of specific performance. On the trial of the action, and also on the trial of the counterclaim at the equity term, plaintiff moved for a dismissal of the counterclaim, on

the ground that facts sufficient to constitute a counterclaim were not set forth, and that such a counterclaim could not be pleaded in this action.

*Sol. Kohn*, for applt.

*James R. Marvin*, for respt.

*Held*, That the counterclaim is in conformity with § 501, Code. It tends to defeat plaintiff's recovery, and is a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. The counterclaim has such a relation to the subject matter of the action that it is just and equitable that both should be settled by one litigation. 93 N. Y., 552. The answer contains all the elements of a good cause of action for specific performance and demands an affirmative relief. Plaintiff could not have been misled by the pleading. Such an answer amounts to a counterclaim. 87 N. Y., 550; 81 id., 251; 1 Lans., 61; 52 N. Y., 237; 37 id., 408.

Judgment affirmed.

Opinion by *Allen, J.*; *Larremore, J.*, concurs.

### STATUTE OF FRAUDS. MARRIAGE.

#### N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Mary Brick, by guardian, *respt.*, v. John Garner, *applt.*

Decided April, 1885.

The provision of the statute of frauds requiring contracts which by their terms are not to be performed within one year from the making thereof to be in writing

and signed by the parties has no application to mutual promises to marry.

Appeal from judgment in favor of plaintiff entered upon verdict.

The complaint alleged that mutual promises were made on the 10th day of October, 1881, to marry in May, 1883, and alleged a breach thereof by defendant in marrying another person. The answer set up a conditional marriage agreement, to the effect that if both parties continued in the same state of mind and neither became dissatisfied, they would get married when both were ready.

The evidence, *inter alia*, showed that defendant continued his attentions as a suitor until Dec. 10th, 1882, and took her to visit his parents in October of that year, where she remained about two weeks. Defendant claimed that the contract was void under the statute of frauds, because by its terms it was not to be performed within a year from the making thereof. The court assumed that the statute applied to this contract, but left to the jury the questions whether there was such unconditional promise to marry as alleged in the complaint, and whether there was a renewal of such mutual agreement or promise within one year next before the said month of May, 1883, when the marriage was to take place. The jury found for plaintiff, defendant excepting to the last clause of the submission.

*J. W. Near*, for applt.

*DeMerville Page*, for respt.

*Held*, That the statute of frauds requiring contracts, which by their terms are not to be performed

within one year from the making thereof, to be in writing does not apply to mutual promises to marry.

The statute of frauds was enacted in England in 1678, and was re-enacted by the legislature of this State in 1787. 1 Rev. Laws, 1813, p. 78, § 11.

Contracts to marry were not actionable at law before the English statute was passed, but were subject to the jurisdiction of the Ecclesiastical Court, which would compel a specific performance. These contracts were not therefore within the mischief which the statute was designed to remedy. Although actions upon such contracts have long been maintained in England, no such defense as this has ever been interposed in that country, so far as the reported cases disclose. The fact that no such defense as this has ever been heard of is cogent evidence against it. The impropriety of requiring such contracts to be in writing is thus stated in *Smith on Contracts*, 97-98: "It has been decided that an agreement between two persons to marry is not an agreement in consideration of marriage within the meaning of this enactment; *it probably having been considered that the legislature did not intend to introduce a practice so contrary to the natural usages of life*; but that these terms are confined to promises to do something in consideration of marriage other than the performance of the contract of marriage itself." 1 *Strange*, 34; 1 *Ld. Raymond*, 386.

There is no reported case in this State where this defense has been

interposed. The title of the statute relates only to goods, chattels and things in action, and does not include mutual promises to marry.

The title of a statute may be considered in ascertaining the design of the legislature, and to limit the meaning of general words. 71 N. Y., 371; 50 id., 477; 49 id., 113; 2 Hun, 436; 91 N. Y., 574; 47 id., 330; 15 id., 532; 25 id., 328; Potter's Dwarries on Statutes, 121-146.

And see particularly 5 N. Y., 463.

This defense was interposed and sustained by the U. S. Circuit Court, Southern Dist. of N. Y., in *Ullman v. Meyer*, 10 Abb. N. C., 281, but the court overlooked the title to the statute, and felt constrained to hold, in accordance with the courts of New Hampshire, Kansas and Maine, that a contract to marry after the expiration of a year is within the statute. 2 N. H., 515; 7 Kan., 377; 56 Me., 193.

But the title of the statute in the former State was simply "Actions;" in the second State "Frauds and Perjuries." In Maine the question was not decided; the title read, "The Prevention of Frauds and Perjuries in Contracts and actions founded thereon." These statutes contained no words limiting the application of the general language used in the acts. In our statute, the title limits its application to cases embraced within the language of the title. It follows that this contract is valid and not within the statute. But even if it was, the court properly submitted to the jury the question of mutual promises within the

year. If no valid contract of marriage subsisted between the parties because of the contract, their conduct and relations towards each other furnished evidence from which a continuing contract might be inferred by the jury. 53 N. Y., 267; 30 id., 285; 6 Cow., 254; 1 T. & C., 377.

Judgment affirmed.

Opinion by *Corlett, J.*; *Haight* and *Bradley, JJ.*, concur.

### ALIENS.

#### N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Maynard, applt., v. Maynard, respt., et al., appls.*

Decided May, 1885.

The heirs of a deceased resident alien and of his blood are capable under our statute of taking and holding land owned by him, whether they be citizens or aliens.

Where such alien heirs are males of full age they must make and file the deposition required by law, and until they do so they take a defeasible title.

Where there are heirs competent to take the title in no case escheats to the State without the finding of an inquisition.

Appeal from judgment dismissing complaint, entered upon the report of a referee.

Action for the partition of real estate. The property in question was conveyed in 1852 to one Jos. de'Sendzimir and his wife, who were aliens, but had both filed the declaration necessary and requisite to enable them to take and hold real estate, but neither of them was ever naturalized. The wife died in June, 1881, and the husband in August following, in possession of this property; both died

intestate without children. The only heirs at law of the husband are two brothers, two sisters, two nephews and a niece, all of whom are defendants in the action and are all aliens and none of them were ever in this country. One of the nephews is a minor.

Defendant M., although not a relative of either the husband or wife, took possession of the property at the time of the husband's death and has since held it under a claim of ownership, and the legislature by Chap. 249, Laws of 1883, released all the rights of the People to him.

The referee decided that defendant M. was the sole owner of the premises and was entitled to judgment dismissing the complaint.

*Edgar Logan*, for applts.

*Wm. H. Secor*, for respts.

*Held*, Error. The conveyance to Jos. de'Sendzimir and wife vested the entire estate in each grantee; each became seized of the entirety, and on the death of his wife the whole estate belonged to him as the survivor. 92 N. Y., 152. As therefore Jos. died intestate and seized of this property it descended to his heirs if there were any persons in existence answering that description with capacity to take the title, unless there had been an escheat to the State.

That under the statute, Chap. 115, Laws of 1845, as amended by Chap. 38, Laws of 1875, all persons who answer the description of heirs of a deceased resident alien and who are of his blood are made capable of taking and holding lands and real estate owned by him at

the time of his decease as his heirs, whether they are citizens or aliens, as if they were citizens. Under the statute the female heirs of Jos. and the male heir who was a minor at the time of his death, possessed capacity to inherit his estate as ample as if they had been citizens.

There is a proviso against males of full age, that they shall not hold the same against the State unless they are citizens or make and file the declaration required by law. But this does not render them incompetent to take the title. That in no case escheats to the State without the finding of an inquisition where there are heirs competent to take. Here all are competent to take, but the male heirs cannot hold against the State unless they become citizens or file the necessary deposition. The male heirs of full age take a title defeasible by the State unless before the consummation of the proceedings instituted to declare the forfeiture they become citizens or file the necessary deposition. But if they do either their right and title becomes absolute and indefeasible. 42 N. Y., 177. Their defeasible title is good except against the sovereign power of the State. Their alienage is a cause of forfeiture which may be established by a judicial proceeding instituted on behalf of the State for that purpose, and that may be defeated even after it is commenced in the manner already mentioned.

No such proceeding has been instituted, and therefore the State never acquired any right or interest



in the premises. It follows that the State possessed nothing which it could grant or release to defendant M. and that he took nothing under the act releasing the interest of the State to him.

It is claimed that these heirs have lost their rights in the property by virtue of the provision contained in Art. 10 of the treaty of 1832 between the U. S. and Russia, which provides that in case of the death of a person holding real estate in either country which would by the law of the land descend on a citizen or subject of the other, who, by reason of alienage, may be incapable of holding it, he shall be allowed the time fixed by the laws of the country, and in case the law of the country actually in force may not have fixed any such time he shall then be allowed a reasonable time to sell such real estate and withdraw and export the proceeds without molestation.

*Held*, That this provision has no application to these defendants; that it applies where real estate would descend on a person incapable of holding the same by reason of his alienage; but the alien heirs of de'S. were capable of taking title to the lands in question.

Judgment reversed and new trial granted; reference vacated.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

#### PUBLICATION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Esther Wunnenberg, *applt.*, v.

Thomas Gearty et al. George Malcolm, purchaser, *respt.*

Decided May, 1885.

An affidavit of plaintiff's attorney stating that he had caused inquiry to be made as to the residence of defendants and that certain defendants were non-residents and resided in Ireland, accompanied by an affidavit stating that deponent received copies of the summons to serve; that he had served some of the defendants but cannot after due diligence serve the defendants named, is sufficient proof of due diligence to sustain an order for service by publication.

Appeal from order denying motion to compel the purchaser at a sale on foreclosure to complete his purchase.

The purchaser's refusal to complete was based on the alleged insufficiency of the affidavits on which an order for service of the summons by publication on certain defendants in the action was granted.

The order was granted on a verified complaint and affidavits made by plaintiff's attorney and by one B. The attorney's affidavit alleges that since the commencement of the action he has made and caused to be made inquiries as to the residence of said defendants and examined documentary evidence as to their names, ages and residences; that said defendants, Elizabeth, Catharine and John Boylan, are each non-residents of the State of New York, and that said defendants each reside at Ballibay, County Monaghan, Ireland; that the said defendant Elizabeth is of full age, and that the defendants Catharine and John are each infants over the age of fourteen

years; that he is informed and believes the summons herein cannot after due diligence be served on said defendants or either of them, and that it is necessary to serve the summons on them by due publication thereof.

B.'s affidavit stated that he was directed by plaintiff's attorney to serve the summons herein on the defendants and for that purpose received copies of said summons; that he has served said summons upon a number of the defendants; that he has been unable with due diligence to make a personal service of the summons on the defendants Elizabeth, Catharine and John Boylan, or either of them, and that he cannot after due diligence serve the same upon said defendants or either of them. It also contains the same statement as to their residence as contained in the attorney's affidavit.

*Boardman & Boardman*, for applt.

*J. F. Bullwinkel*, for respt.

*Held*, That if the statutory provisions, Code, §§ 438, 439, are to receive a practical construction they have been satisfied in this case. They do not require extreme diligence or extraordinary exertion. They only require proper, suitable diligence such as the circumstances require, and what was required in this case? After it was ascertained that the defendants to be served resided in Ireland the strong natural presumption arose that they were there and could not be found in this State. Still the efforts to make personal service did not cease and a competent person was charg-

ed with the duty of finding all the defendants and making personal service. He received the summons and commenced the performance of his duty and found a number of the persons to be served, but was unable after due diligence to find the three defendants named. Was not this reasonable diligence? Did the circumstances of the case require more? If so, what more? No diligence could result in personal service within the State, for the persons to be served were in Ireland. An effort was made to serve all the defendants personally within this state, and in view of the non-residence of the defendants in question that attempt amounted to due diligence and was all that could be required. These defendants resided in Ireland, and while that fact did not dispense with the necessity for some effort to make personal service in this State, yet it does assist in the solution of the question of due diligence, and under all the circumstances of the case we conclude that the order of publication was on proof sufficient to sustain its validity.

We cannot overlook the fact that the objection to this order of publication is technical and that title to real estate depends upon the validity of this judgment, nor that other important fact that ample and liberal provision is made by § 445 of the Code to open the judgment for defendants served by publication and permit them to defend even seven years after the filing of the judgment roll.

*Kennedy v. Life Ins. Co.*, 32

Hun, 35; Carleton v. Carleton, 85 N. Y., 33, distinguished.

Order reversed, with costs and disbursements, and motion granted, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

### APPEAL.

N. Y. COURT OF APPEALS.

Goddard, *applt.* v. Stiles, *respt.*

Decided May 5, 1885.

Judgment was recovered against defendant for \$104 and costs and the present plaintiff was subsequently substituted on condition that he pay the attorney \$800. The attorney agreed to take \$630 and defendant paid him that sum in settlement of the judgment. On motion to set aside an execution issued on said judgment it appeared that the attorney's compensation was fixed by the written stipulation of the parties. *Held*, That as the motion involved a question of fact an appeal would not lie to this court.

This action was commenced in 1865 by one S., to reach certain premises subsequently sold at foreclosure. Defendant had purchased the premises, claiming to act as trustee for plaintiff, who was then a minor. In 1867 judgment was recovered and plaintiff adjudged to be the owner of the premises subject to a mortgage. An accounting was had under said judgment for the rents and profits, which were fixed at \$114.09, but no allowance was made defendant for permanent improvements. This was held to be error, and on a further accounting the value of such improvements was fixed at \$1,689.51, and judgment was accordingly entered with the several findings.

On a foreclosure of the mortgage there was a surplus of \$2,595.22, which was deposited with the county treasurer. Plaintiff was appointed receiver upon a judgment recovered against S. and was substituted in his place in this action on condition that he should pay to the attorney and counsel of S. their fees and charges, which were fixed at \$800. An order was made directing that defendant should be paid the amount of his judgment for permanent improvements out of the surplus. The balance, \$1,118.79, was paid to plaintiff as receiver. It was claimed that plaintiff's attorney was entitled to the amount of the judgment for rent and profits and costs at the time of the entry of the final judgment, viz., \$494.04, and enough more to make up the \$800 allowed him by order of the court. Subsequently he consented to take \$630, in lieu thereof, and defendant paid him that sum in settlement of said judgment and it was accepted in full satisfaction of his lien for costs. Soon after plaintiff's appointment as receiver an execution was issued on the judgment in this case to collect the same. It was vacated by the Special Term and the judgment declared satisfied and discharged by the payment of said \$630. The General Term affirmed the order and the Court of Appeals reversed the General Term, but did not deny the motion made to vacate. A new execution was then issued by the receiver, and a new motion made to vacate the same, which was granted and the order affirmed

at General Term. It appears from the papers on this last motion that the compensation of the attorney was fixed by the written stipulation of the parties.

*J. S. Van Voorhis*, for applt.

*W. H. Adams*, for respt.

*Held*, That as the motion involved a question of fact the order granted was discretionary and no appeal lies to this court.

Appeal dismissed.

*Per curiam* opinion. All concur.

### INDICTMENT. CRIMINAL LAW.

N. Y. SUPREME COURT. GENERAL  
TERM. FOURTH DEPT.

The People, *respts.* v. William  
Menken, *applt.*

Decided May, 1885.

Sections 275, 276, Code Crim. Pro., do not deprive the People of the right to state the acts constituting the supposed crime in different counts in language appropriate to meet such circumstances and features of the event as may be developed on the trial, especially where there was no eye-witness of the event and the facts must be proved by circumstantial evidence.

The fact that the Lieutenant-Governor, who is now acting Governor, and to whom application for pardon must be made, assisted the District Attorney on the trial is not a ground for a motion in arrest of judgment.

Appeal from judgment entered upon conviction of defendant of the crime of murder in the first degree.

On the evening of Jan. 6, 1884, the body of one Katie Bredehoft was found by some boys under a bridge in the town of Elmira, Chemung Co. Notice was given to the proper officers and an investigation made which resulted in the arrest of defendant in Flatbush and the discovery in his possession

of articles of jewelry and personal property of deceased. Defendant was indicted, charged with having feloniously caused the death of Katie Bredehoft, and was tried and convicted at the April Oyer and Terminer. A new trial was granted for irregularities on the trial and the venue afterwards changed to Broome Co., where he was again tried in December, 1884, and convicted of murder in the first degree.

The indictment contained nine counts. At the Oyer and Terminer held in April, 1884, defendant demurred to the indictment as a whole, "for that the same does not conform substantially to the requirements of §§ 275, 276 of Chap. 442, Laws of 1881, \* \* \* the several amendments thereto," and among other reasons why the same did not conform to the said sections defendant alleged that said indictment did not contain a plain and concise statement of the acts constituting the crime charged in the indictment without unnecessary repetition.

"Second, He demurs to that portion of the indictment which is written before the second count, for that the same does not conform substantially to the requirements of §§ 275, 276, Code Crim. Pro. of the State of New York: First, that it does not contain a plain and concise statement of the acts constituting murder in the first degree without unnecessary repetition. Second, that it does not allege that the acts charged against defendant were committed with a design to effect death.

Third, that it does not allege that said defendant, 'her, the said Katie Bredehoft, wilfully and feloniously did kill and murder.' Fourth, that it does not contain a plain and concise statement of the acts of defendant which it alleged constituted the crime of murder in the first degree committed by him. Fifth, that there is in said count much unnecessary repetition. Sixth, that the acts charged in the said count to have been committed by said defendant do not constitute the crime of murder in the first degree."

Substantially the same objections were stated as to the second, third, fourth, fifth and eighth counts, and then it is stated that "Said defendant alleged in support of each and every hereinbefore set forth demurrers that said indictment and each count thereof sets forth much immaterial matter and many immaterial allegations which are improper and unlawful to set forth in said indictment and which is wrongfully and unlawfully set forth in said indictment to the great hurt and prejudice of said defendant, and that there is much unnecessary repetition contained in said indictment and in each count thereof which is improperly and wrongfully set forth therein to the great hurt and prejudice of said defendant, and that said indictment contained many unnecessary counts which are unlawfully and wrongfully set forth in said indictment, to the great prejudice of said defendant."

The People answered the demurrer, argument was had and the court overruled the demurrer.

*Gabriel L. Smith*, for applt.  
*John B. Stanchfield*, Dist. Atty.,  
for respt.

*Held*, No error. Section 273, Code Crim. Pro., abolished all "the forms of pleading in criminal actions" existing prior to its adoption, and it prescribed that "hereafter the forms of pleading and the rules by which the sufficiency of pleadings are to be determined are those prescribed by this Code."

It is to be observed that in none of the statutory regulations relating to an indictment is there an inhibition against using several counts or varying the language in different counts to meet any aspect of the evidence which may be presented tending to support the general charge against the defendant. From a reading of § 275 we are not induced to believe that it was the intention of the legislature to deprive the People of the right to state the acts constituting the supposed crime in different counts in language appropriate to meet such circumstances and features of the event as should be developed in the full and careful investigation which takes place in the progress of a trial; nor can we suppose that it was the intention of the legislature to limit the indictment to a single statement in one count of the offense charged against the accused. Evidently it was the intention of the legislature to prescribe a more liberal and flexible system of pleadings in criminal cases than that which obtained under the Common Law, or which was in vogue in this State prior to the adoption of the Code

of Crim. Pro. In support of this view § 684 must be borne in mind; it is as follows: "Neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor an error or mistake, renders it void, unless it have actually prejudiced the defendant or tended to his prejudice in respect to a substantial right."

From an inspection of the record we may reasonably infer that there was no eye-witness of the crime and that the People were required to establish the accusation made against him in the indictment by circumstantial evidence, and that the means by which the crime was committed were not clearly and definitely ascertainable or ascertained at the time the indictment was prepared; hence the case was a proper one for the application of the proposition given in § 279 Code Crim. Pro., which is as follows: "The crime may be charged in separate counts to have been committed by different means, and where the acts complained of may constitute different crimes such crimes may be charged in separate counts." See 21 W. Dig., 374; 98 N. Y., 537; 80 id., 500; 64 id., 485.

As has already been stated, there was no demurrer interposed to the sixth, seventh and ninth counts of the indictment, and upon that record it is not to be said that the conviction did not take place under either one or the other of those counts. It is well settled that where there is one good count in an indictment and evidence to support it the conviction must be sus-

tained although the indictment contained other counts which are defective. 56 N. Y., 95; 79 id., 365; 82 id., 339; 83 id., 419.

*Also held*, That no error was committed in refusing to compel the District Attorney to elect under which count he would try defendant. The application made in that behalf was addressed to the discretion of the court, and the court committed no error in denying it. 75 N. Y., 477; 70 id., 38; Code Crim. Pro., § 684.

A motion was made in arrest of judgment on the ground that Lieut.-Gov. Hill, "who it is known is to be Governor of the State of New York on the first day of January next, and to whom any application for pardon for defendant must be made, appeared as counsel for the People in this case." The motion was denied.

*Held*, No error. There is no provision of the Constitution of the State or the statutory law which prevents the Lieutenant-Governor from aiding a district attorney in the prosecution of a capital case. Surely a Lieutenant-Governor of the State, even though it be known that he is to succeed to the office of governor, has a legal and constitutional right to aid in the enforcement of the criminal laws of the State. Section 7 of Article 4 of the Constitution provides, if, during a vacancy of the office of governor, the Lieutenant-Governor shall be impeached, displaced, resign or die, or *become incapable* of performing the duties of his office or be absent from the State, the President of the Senate shall act until

the vacancy be filled or the *disability* shall cease. There was nothing before the Oyer and Terminer to indicate that the presence of the Lieutenant-Governor as counsel for the prosecution of defendant has in any manner impaired, lessened, interfered with or prejudiced the rights of defendant. It was very proper for the court to assume that the duties devolving on the executive branch of the government in accordance with the provisions of the Constitution would be properly performed whenever occasion should arise for their performance. Again, § 467 declares that a motion in arrest of judgment is an application that no judgment be rendered upon a verdict against defendant, and provides that such application "may be founded upon any of the defects in the indictment mentioned in § 323. The grounds enumerated in § 323 do not embrace the ground relied on by defendant. An enumeration of the grounds upon which an application for arrest of judgment may be made in that section of the statute was probably intended to exclude any other grounds.

*Also held*, That there was no error in refusing the motion made for a new trial on the ground of alleged irregularities of the jury subsequent to the charge. In the determination of the motion the court was called upon to ascertain and determine whether "the jury had been guilty of any misconduct by which a fair and due consideration of the case had been prevented." Code Crim. Pro. § 465, sub.

3. It has been held in numerous cases that an irregularity which did not prejudice the substantial rights of defendant "would not vitiate the verdict unless it be shown that defendant was prejudiced thereby." 28 Hun, 2; *id.*, 48; 4 Park., 319. We think it was very clearly and satisfactorily shown in the opposing affidavits that nothing transpired in the presence of the jury calculated to, or which did, interfere with or influence their deliberations or prevent a fair and due consideration of the case.

Judgment and order affirmed and judgment ordered to be enforced.

Opinion by *Hardin, P.J.*; *Follett* and *Merwin, JJ.*, concur.

#### MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Pendergast v. The Johnston Harvester Co.

Decided June, 1885.

In view of the evidence, *held*, that it can not be said as matter of law that there was no want of care on plaintiff's part to which the injury complained of may be attributed, and that the questions of negligence and contributory negligence, were for the jury to determine.

Motion by plaintiff for new trial on exceptions taken at Circuit and ordered heard at General Term in first instance.

Action to recover for injuries alleged to have been caused by defendant's negligence. Plaintiff was nonsuited. While in defend-

ant's employ, plaintiff was injured by the fall of an elevator constructed and provided by defendant for plaintiff's use in his employment. At the time of the accident plaintiff was giving his care and attention to the load of freight which was being carried on the elevator, and had confided the management of the elevator to one M., whom he had procured to help him. For aught that appears M. was a proper person for that purpose, he was one of defendant's workmen, and plaintiff in selecting one of the workmen to help him acted in pursuance of defendant's directions. The elevator was raised by means of a rope which the operator, standing in the elevator, took hold of hand over hand, and, as is to be inferred, so long as the operator had hold of the rope the elevator could not descend, if it was in good order. Plaintiff testified that when the accident occurred M. had in his hand the rope they were going up on.

*Satterlee & Yeoman*, for plff.

*S. D. Bentley*, for deft.

*Held*, That the evidence was at least *prima facie* that the fall of the elevator was not due to any lack of care on the part of plaintiff or his assistant.

The testimony of two witnesses, G. and W., was to the effect that some time before the accident they observed certain defects about the machinery. Those defects were of such a nature as to make it a question for the jury whether the defects or either of them were sufficient to have caused and did

cause the fall of the elevator. There was no evidence that the defects had been remedied, and none that plaintiff knew of them. There was evidence that defendant's superintendent had notice of one of them when the witnesses discovered it.

*Held*, That there was sufficient evidence of negligence on defendant's part and of absence of negligence on plaintiff's part to make a case for the jury.

New trial ordered, costs to abide event.

Opinion by *Smith, P.J.*; *Barker, Haight*, and *Bradley, JJ.*, concur.

#### MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Joseph S. Griswold, *respt.*, v. Minerva L. Davey et al., *appls.*

Decided May, 1885.

Plaintiff's assignor held a mortgage on village lots 18, 14, 15 and 16. Defendant D. held three prior mortgages, the first two on lots 18, 14 and 15 and the third on lots 18, 14, 15 and 16. D. agreed with A. S., the owner of the equity of redemption, that she would foreclose the second of her mortgages and bid on the sale the amount due on all her mortgages, and A. S. agreed that she would pay the costs of foreclosure and redeem lots 18, 14 and 15 within a certain time. D. carried out her agreement and A. S. paid the costs but failed to redeem. Plaintiff's assignor was a party to the foreclosure. *Held*, That by this arrangement the mortgage of plaintiff's assignor became a first lien on lot 16.

By the payment of the costs by A. S. there was a small surplus on the sale resulting from D.'s bid. *Held*, That plaintiff was entitled to the benefit of this surplus.



This action was brought to foreclose a bond and mortgage given to Alfred Griswold by one Scribner and wife, Adelaide, in 1873. In 1878 it was assigned to plaintiff. The mortgage covers lots 13, 14, 15 and 16. It is sought to be foreclosed against lot 16 only. The defendant Davey held two mortgages, both prior in time and record to plaintiff's mortgage, given by Scribner and wife; one was for \$2,500 and one was for \$1,500. Of these the first was on lots 13, 14 and 15 and the second was on lots 13, 14, 15 and 16. On lots 13, 14 and 15 there was also a \$3,600 mortgage owned by Alfred Griswold, and given by Scribner and wife. The defendant Davey, in 1876, made an agreement with Adelaide Scribner, the then owner of the equity of redemption in lots No. 13, 14 and 15, by which Davey was to purchase of Griswold the \$3,600 mortgage (which was done) foreclose the \$2,500 mortgage and bid in lots 13, 14 and 15 on the sale providing she could get them for a sum not exceeding the amount due on the three mortgages, and she was to give Adelaide Scribner such time in which to redeem them as they should thereafter agree was reasonable. Such an agreement to redeem was afterwards executed in writing. Adelaide Scribner agreed to pay, and did pay the costs of foreclosure. The \$2,500 mortgage was foreclosed in April, 1876, and Alfred Griswold, plaintiff's assignor, was made a party. Davey bid \$6,000, the amount due on her three mortgages being \$5,870, and there was

a surplus of \$128. She did not pay the money but receipted for it. Mrs. Scribner did not redeem. In 1881 Davey attempted a statutory foreclosure of her \$1,500 mortgage which covered lots 13, 14, 15 and 16, and under this lot 16 was sold to her daughter. The present plaintiff by his attorney forbid the sale, claiming that Davey's mortgage was satisfied and that plaintiff's mortgage had become a first mortgage on lot 16. In this action the court so held, and also held Davey liable for the surplus, \$128.

*O. F. Davis*, for applt.

*Hill & Lillie*, for respt.

*Held*, That the judgment was right. The plaintiff's assignor, Alfred Griswold, was a party to the \$2,500 foreclosure and his security was placed in peril. If lots 13, 14 and 15 brought enough to pay Davey's three mortgages he would have the whole of lot 16 to resort to. If they brought more the surplus would be applicable to plaintiff's mortgage. If Davey had not bid \$6,000 some one else might have done so. It may be that, as between herself and Adelaide Scribner, Davey might have repudiated her bid on Scribner's failure to redeem. But not so as to plaintiff's assignor. He was a party and the sale could not be set aside but by his consent or the order of the court. The surplus was protected from the costs by Mrs. Scribner's payment of them with Davey's consent. And plaintiff gets the advantage of it.

The mortgages of Davey being satisfied, the statutory sale was

void, for as against plaintiff's mortgage she had then no mortgage on lot 16.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

#### PARTNERSHIP. JUDGMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles S. Hine et al., *appls.*, v. Peter Bowe, sheriff, *respt.*

Decided May 8, 1885.

When two plaintiffs bring an action as co-partners to recover damages for the conversion of certain goods the defendant is not entitled to a verdict merely because it appears that the plaintiffs are not co-partners. Even if there is no partnership, if one of the plaintiffs was the legal and *bona fide* owner of the property at the time of its conversion, he is entitled to a verdict in his favor for its value under § 1204, Code of Civ. Proc.

Appeal from judgment recovered on verdict and from order denying motion for a new trial.

This action was brought by the plaintiffs as co-partners to recover damages for the conversion by defendant of certain personal property. This property had been seized by defendant, as sheriff, under a warrant of attachment against the property of the persons who had sold it to plaintiff Hine, claiming that such sale was fraudulent. It appeared upon the trial, that, by the agreement under which the plaintiffs were associated in business, the interest of the plaintiff P. in the firm was limited to the guaranteed sum of \$20 per week to be paid in lieu of profits. Upon this subject the court

charged the jury that, if they should find that there was no real partnership between the plaintiffs, the verdict would be for the defendant because the whole foundation of the plaintiffs' cause of action was that they, as co-partners, on the day of the alleged illegal seizure of the property, owned it.

*Wm. H. Arnoux*, for *appls.*

*Charles F. McLean*, for *respt.*

*Held*, Error. That it did not follow that defendant was entitled to a verdict simply because P. was not a real partner with the other plaintiff, Hine, in the business. That if P. had no interest whatever in the property or capital of the business, and the other plaintiff, Hine, was its owner and the sale to him was not fraudulent, then he would have been entitled to recover a verdict against defendant for the value of the property which was seized under the attachments. Code, of Civ. Pro. § 1204.

Judgment and order reversed, and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.*, concur.

#### MUNICIPAL CORPORATIONS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

John B. King, admr., *respt.*, v. The City of Troy, *applt.*

Decided June, 1885.

A heavy counter belonging to a third person was tilted up against a house and allowed to remain upon a sidewalk of defendant for several days. It fell over

and killed a child aged five. No one saw the accident, but there was evidence showing that the child was playing on and about it at the time. On this point there was no rebutting evidence. *Held*, That plaintiff, the father, could not recover, as the act which injured the child was not shown to be the act of defendant.

The common council of defendant appoint its police commissioners and the latter appoint policemen. The commissioners are not amenable to the city and can only be removed by the Supreme Court. Accordingly *held*, that notice to a policeman of defendant of an obstruction in the street was not notice to defendant.

Appeal from judgment against defendant for negligence. It appeared that a heavy countersome 18 feet long, belonging to a third person, was tilted up on one edge upon a sidewalk. It fell and killed plaintiff's child aged five years. No one saw the accident, but there was evidence tending to show that the child with others was playing on and around the counter.

*Smith, Fursman & Cowen*, for resp't.

*W. J. Roche*, for applt.

*Held*, That the judgment should be reversed. The evidence tends strongly to show that the accident was caused because the child meddled with the counter and plaintiff has given no evidence to repel this conclusion. Therefore defendant's negligence has not been shown to have caused the child's death. Defendant may have been negligent in allowing the counter to remain for several days on the sidewalk and yet not negligent in the act which caused it to fall on the child. The act of the child may have been the proximate cause of its own death. If it was the

act of the child, which was, as assumed on the trial, *non sui juris*, then defendant cannot be held unless there is proof of voluntary or culpable negligence. 21 Wend., 615; 47 N. Y., 323; 38 id., 455; 63 id., 104; 60 id., 326. All the negligence charged here is constructive—imputable because defendant did not discover and remove the counter.

Under objection plaintiff was allowed to prove that policemen patrolled the street and that one of them had noticed this counter. We think the police of Troy are not agents of the city and that notice to them is not notice to it. By Ch. 328, Laws of 1880, as amended by Ch. 76, Laws of 1881, the common council appoint the police commissioners, who can only be removed by this court. The police department therefore is a creation under the laws of the State. 74 N. Y., 619.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur on the ground that the act which injured the child was not shown to have been the act of defendant.

### CORPORATIONS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People v. The Atlantic Mutual Life Ins. Co. Petition of Wm. Barnes.

Decided May, 1885.

Where the existence of a corporation is attacked it is the duty of its officers to offer resistance if the facts justify it, and the

court should compensate counsel who have in good faith acted for the corporation sought to be dissolved after a Receiver had been appointed.

This was a petition of Wm. Barnes for services rendered defendant and not its receiver after the latter was appointed.

*C. J. Buchanan*, for applt.

*Wm. Barnes*, for respt.

*Held*, That an allowance was properly made within Barnes v. Newcomb, 89 N. Y., 108, where this same claim was presented by action.

1. The company appears to have been deprived of its property and business on a contested allegation of insolvency. There were reasonable grounds for the company to hope that it might reverse the order appointing a receiver.

2. After the appointment of a receiver the statute, Ch. 902, Laws 1869, required that a competent actuary should examine the condition of the company and report whether its assets were sufficient to enable it to meet its obligations matured and to mature. The actuary made an adverse report. When made the principles on which he made the estimate of maturing liabilities were not well understood. If a different basis had been adopted the company would have been shown solvent and might have been reinstated. It was natural, therefore, that the company should contest the accuracy of the report.

3. Pending the litigation the assets so appreciated in value that they appeared to exceed its liabilities. On this ground the company applied to be restored. This effort

was unsuccessful mainly because the court thought that a life insurance company discredited by hostile litigation at the suit of the State could not with safety to its policy holders be permitted to resume business. 74 N. Y., 177; 77 id., 336.

Order affirmed.

Opinion by *Landon, J.*; *Bockes, J.*, concurs. *Learned, P.J.*, dissents.

#### WATERCOURSE. TRESPASS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Henry T. Trevitt et al., *respts.*,  
v. Wesley Barnes et al., *appls.*

Decided May, 1885.

D. conveyed to plaintiffs six acres, a mill site on the same, the use of all the waters of a creek and the right to use and maintain a dam across it and to convey its waters to the mill. The dam was a quarter of a mile distant from the six acres. Plaintiffs went into possession, under their deed, of the mill, the dam and the raceway and put the same into good condition. Defendant, who as against plaintiffs makes no claim of title or possession, negligently floated logs down the stream and destroyed the dam. D had no title to the land on which the dam and raceway were, but claimed a right to maintain them. *Held*, that plaintiffs could recover damages for the destruction of the dam.

In 1881 one Dunsburg conveyed to plaintiffs six acres, of which he had been for some years in possession. The deed then conveyed a mill site and appurtenances on the six acres, also the reservations and privileges mentioned in a certain deed of one Schermerhorn to one Bentley "in these words:" it then recited the use of all the water in

Hans Creek and the use and maintenance of a dam across the same so as to convey its waters to the mill site as heretofore used. The dam was not on the six acres and was a quarter of a mile up the stream, and the raceway ran from the dam to the mill which was on the six acres. The mill had been in operation fifty years, but with some interruptions. Without the raceway there was no mill site on the six acres. There was no evidence that Dunsburgh ever had title to the dam and raceway. Plaintiffs entered into possession of the six acres, the dam, the mill and the raceway and restored them to usefulness, they having become dilapidated under Dunsburgh. Defendants negligently flooded the creek, floated logs down it and destroyed the dam. For this injury plaintiffs recovered.

*A. Pond*, for appls.

*L'Amoreaux, Dake & Whalen*, for respts.

*Held*, That the action could be maintained. We think plaintiffs showed title in themselves to the dam by proving their deed and their own possession under it. 39 N. Y., 302. There was no contention here between plaintiffs and any one claiming to have a better title. Defendant did not claim any title, possession or right in derogation of plaintiffs' claim. Until their right was challenged plaintiffs might rest on their deed and possession. 2 Johns, 23; 4 id., 211; 18 Barb., 84; 33 id., 389; 16 id., 134. Defendants gave evidence which they claimed tended

to show title in a stranger; and even if the latter could defeat plaintiffs this is a concession that defendant cannot.

The right to erect the dam was an easement and defendants contend that seizin cannot be predicated of it. But the dam erected was a corporeal substance of which plaintiffs could have possession.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Bockes, J.*, concur.

#### MASONIC LODGES. LEASE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

*Morris Cohn, respt.*, v. *Jeremiah Borst, Treasurer of Lodge No. 394, F. & A. M., applt.*

Decided May, 1885.

At a meeting of a Masonic lodge, a quorum being present, by a majority vote a committee was authorized to lease a room for its use. The by-laws gave such a majority power to act. The committee did so and signed the lease with the name of the lodge, adding "by their committee, S. J. T., L. T. F. and C. H." They affixed their own seals. *Held*, That the lodge was bound and that an action on the lease was well brought against its treasurer.

The lease on which recovery was had recited that it was made between plaintiff and "Lodge No. 394 of Free and Accepted Masons, by their committee, S. J. Thacher, L. T. Fox and C. Hamilton." The lodge was a social organization composed of about fifty members, having officers and property.

*H. Krum*, for applt.

*N. P. Hinman*, for respt.

*Held*, That, as was apparent on its face, the lease was the lease

of the lodge and not that of the members of the committee. 94 N. Y., 145. It is immaterial that they signed their individual names and did not repeat after their signatures their representative character. The lodge was *de facto* such an association as is described in Ch. 258, Laws of 1849, amended by Ch. 445, Laws of 1851, and under these statutes the action is well brought against the association in the name of its treasurer. 21 Barb., 650; 32 How. Pr., 289; 2 Lans., 17; 11 Abb., 470; 23 Barb., 47; 4 Abb. N. C., 300. It was competent for the persons composing the lodge to hire a room in which to hold their meetings, and it was competent for them to agree by their by-laws that a certain number less than the whole should at a stated meeting constitute a quorum, and that such quorum by a majority thereof could act for the whole body.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

#### SERVICES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Patrick Collins, *respt.*, v. Jane A. Jones, *applt.*

Decided April, 1885.

In an action to recover for services the defendant has a right to prove what payments have been made. A general objection to such evidence presents no ground for its rejection.

Appeal from judgment of county court, affirming judgment of justice's court in favor of plaintiff.

Action to recover on a claim for legal services assigned to plaintiff. Defense, general denial, payment, set off and for money loaned. Each party furnished a bill of particulars. Defendant's bill charged \$8 paid in 1882 and 1883, and \$5 for money loaned.

The record shows that on the trial before the justice defendant was asked, on her direct examination, "About how much have you ever paid Mr. Collins? Objected to. Sustained."

*Ludington & De Camp*, for *applt.*

*Terry & Terry*, for *respt.*

*Held*, Error. Defendant had right to prove what payments she had made. If plaintiff wished the question to specify the time and place an objection should have been made on that ground. The evidence was generally competent and this general objection presented no ground for its refusal.

Judgment of county court and of justice's court reversed, with costs.

Opinion by *Follett, J.*; *Hardin, P.J.*, and *Boardman, J.*, concur.

#### AGENCY.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Mary E. Plass, *applt.*, v. George Brusie, *respt.*

Decided May, 1885.

Plaintiff asked M., an attorney, whether he knew where she could invest \$2,000 on a first mortgage. He said he did not, but would let her know if an opportunity came. A few days after defendant went to M. and asked if he knew where defend-

ant could get a loan of \$2,000. Defendant said there were two small mortgages on his farm; that he wished these paid but not cancelled, to be held as collateral security to the new \$2,000 mortgage. M. communicated with plaintiff, who said she would take only a first mortgage, to which M. replied that the two small mortgages should be paid and satisfied. Defendant executed the mortgage. M. gave him a memorandum of the transaction and withheld the sums due on the small mortgages, stating in the memorandum that the latter were to be paid and assigned to plaintiff. Plaintiff never saw defendant during the transaction and had no knowledge that the small mortgages were to be assigned and not satisfied. M. procured one to be assigned to plaintiff, the other was not so assigned and M. did not account to either party for the money in his hands to pay the other mortgage. *Held*, That M. was the agent of plaintiff and the loss must fall upon her.

The action was foreclosure. Upon the facts above stated the court held that the recovery on the \$2,000 mortgage could not include the sum withheld by M. to pay the small mortgage which he failed to pay or account for.

*Newkirk & Chace*, for applt.

*Andrews & Edwards*, for resp't.

*Held*, That M. was plaintiff's agent and was not defendant's. It was the attorney's (who was also a broker in the transaction) duty to plaintiff not to allow defendant to take the \$2,000 in whole, but to detain so much of it as would provide for the two small mortgages. 2 Abb. N. C., 22. He represented to plaintiff he would do this and probably expected to. It appears that the holder of one of the small mortgages would not receive payment. If then with her assent he detains the money he does so that she may through him be sure that

the smaller mortgage shall be taken care of. It is true that defendant also leaves his money in M.'s hands. But what else can he do? He undertakes to give what shall be equivalent to a first mortgage. He does this by leaving with plaintiff's broker sufficient money to take care of the small mortgages. To the assertion that defendant left his money with M. and appointed him agent in its disposition it seems an answer to say that by the loan defendant never became entitled to the free disposition of this money; he assented to M.'s retaining it, since otherwise plaintiff would not have taken his mortgage. This case is like *Graves v. Mumford*, 26 Barb., 94.

Judgment affirmed.

Opinion by *Landon, J.*;  
*Learned, P.J.*, and *Bockes, J.*,  
concur.

#### GUARDIAN. COSTS.

N. Y. SUPREME COURT. GENERAL  
TERM. FIRST DEPT.

*In re* settlement of the account  
of Alice Clark, admx.

Decided May 8, 1885.

When upon the judicial settlement of the account of an administratrix whose intestate was the general guardian of a ward who lived with him and whom he had charged for board, the ward is allowed to testify without objection that she did not think that her board bill was correct, and that she should have been credited with the value of services performed by her for her guardian, and an allowance is made her by the surrogate for such services, it is too late to raise the objection upon appeal that the charge for board in the account had not been properly surcharged or objected to as excessive, and

that no claim or demand for services had been interposed on behalf of the ward.

Where a ward boards in the family of her guardian and is charged for board, and while so residing in her guardian's family renders services of value, those services should be allowed as a claim to reduce the charge for board.

Section 2561 Code of Civ. Pro., by which \$10 costs may be allowed for each additional day beyond two days where a trial or hearing before the surrogate necessarily occupies more than two days, is equally applicable to a hearing before a referee appointed by the surrogate as to a hearing before the surrogate in person; but the said section does not contemplate or empower any allowance for days on which an adjournment occurs without any actual hearing.

#### Appeal from decree of surrogate.

Michael Clark, the decedent, was the general guardian of Mary E. Farrell, who lived with her guardian and was charged by him \$5 a week for board. On the hearing before the referee, to whom the account of the administratrix and her objections thereto were referred, Mary E. Farrell testified that she did not think her board bill was right; that she ought to have a credit for services performed by her in her guardian's family, and that in her opinion her board was worth \$3 or \$3.50 per week. No objection was made to this testimony and upon it the referee made her an allowance, which was confirmed by the surrogate. The propriety of this allowance was drawn in question upon this appeal upon the ground, among others, that no objection was filed to the allowance of the full amount of the board charged by the guardian in his accounts.

*Todd & Dayton*, for appls.

*F. W. Diehl*, for resp't.

*Held*, That no point having been taken before the referee or before the surrogate that the charge for board had not been properly surcharged or objected to as excessive, and that no claim or demand for services had been interposed on behalf of Mrs. Farrell, it was too late to raise such objections upon the appeal, because if they had been made at that time the surrogate might have allowed the proper amendments to have been filed or the claim for services interposed *nunc pro tunc*. That where a ward boards in the family of her guardian and is charged for board and renders services of value in the family, those services should be allowed as a claim to reduce the charge for board, and the allowance to Mary E. Farrell was, therefore, right.

In the bill of costs allowed by the surrogate were the following items :

Allowance for trial before the referee—ten days when the case proceeded and six days adjournments.....	\$125.00
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Three days before the surrogate .....	30.00
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These items were claimed to be erroneous, and the point was raised that § 2561, Code of Civ. Pro., whereby \$10 for each additional day beyond two days may be allowed where a trial or hearing upon the merits before the surrogate necessarily occupies more than two days is applicable only to a hearing before the surrogate in person, and not to one before a referee appointed by the surrogate.



*Held*, That a hearing before a referee appointed by the surrogate in legal contemplation should be considered as a hearing before the surrogate himself, and in a proper case the \$10 a day additional may be allowed.

That, however, the section of the Code, *supra*, does not contemplate or empower any allowance for days in which an adjournment occurred without any actual hearing, and that the item of \$25 ought therefore to be stricken out.

Decree modified by deducting \$25, and affirmed as modified without costs.

Opinion by *Davis, P.J.*; *Daniels, J.*, concurs.

#### BANKS. SALARIES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Walter Jernnery, *respt.*, v. Aaron B. Olmstead et al., *appls.*

Decided May, 1885.

Under an agreement that a president should be paid out of the net profits of a bank, to entitle him to salary it must appear that the profits were actually realized and not estimated. So where a bank held government bonds which were worth more than their cost on a certain day and a calculation of the bank's assets and liabilities was made as of that day and the bonds, though not sold, were put in at their current price, whereby it appeared that there was a profit, and that the president was therefore entitled to salary, *held*, that the method adopted was incorrect; that there having been no sale of the bonds there could not be, as to them, any net profit.

The defendant, Olmstead, was elected president of a savings bank. A resolution fixed his compensation

at such a sum from the net profits, after paying all incidental expenses, as such profits might warrant, not exceeding \$1,000. This action is upon a bond which defendant gave to the bank conditioned for the faithful performance of his duties. The main question is whether the bank made any net profits in 1869. It was admitted that there was no profit unless the appreciation of certain bonds, not sold, was credited.

*M. Hale*, for *appls.*

*E. T. Brackett*, for *respt.*

*Held*, That the judgment should be affirmed. The defendant's claim that there were net profits is arrived at by taking the difference between the purchase price and the market value of certain government bonds then owned by the bank (the value of the bonds having in the meantime appreciated) and calling that appreciation in value profits. This is not profits. The bonds have not been sold, and until sold there cannot be said to be a profit. An estimated profit is not meant. The profits are the amount of money received by the bank by way of interest over and above the amount of interest it has to pay its depositors, together with the amount of any money it has received by the sale of property over and above its cost to the bank. If no such sale has been made there has been no profit on this score, even though a profit might have resulted had a sale been made. The president's salary could not be arrived at by estimation, for a sale might subsequently be made of the security at a loss and the pres-

ident might have received his salary and yet the bank have made no profit.

This reasoning does not apply to the same extent to a loss. For without any sale property may plainly depreciate in value permanently; it may be burned or stolen. And such a loss must be deducted before net profits can be arrived at. There is a great difference between a realized, admitted loss and an unrealized, possible gain.

Judgment affirmed.

Opinion by *Peckham, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

#### SERVICES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Jared Webster, *respt.*, v. Seth W. Nichols, *ex'r.*, *applt.*

Decided May, 1885.

In an action to recover for services it appeared that the testator before becoming a member of plaintiff's family asked the consent of plaintiff's wife and of plaintiff and made a bargain with her as to the terms upon which they would take care of him. He was broken in health, nervous and irritable. He was a cousin of plaintiff's wife's father. *Held*, That plaintiff was entitled to recover.

It was shown by the defense that testator did a little work about the house and sometimes bought some supplies; and this was urged as a fulfillment of his promise of payment. *Held*, That it was proper for plaintiff to show the amount of his property, and that testator was reasonably well off.

Where an executor resists such a claim and reduces it one third, no costs should be allowed against him below or here.

Defendant's testator was a cousin of plaintiff's wife's father.

Testator asked to be allowed to live in plaintiff's family and talked about it with his wife. Afterwards he saw plaintiff and told him he had made a bargain with his wife, to which plaintiff replied that any trade testator made with plaintiff's wife was all right. He lived in the family from 1874 to 1882. He was broken in health, nervous, irritable and a hypochondriac. He had no family of his own. He was worth \$11,000. He told others plaintiff should be paid for taking care of him. He left plaintiff's wife a legacy of \$600. The referee found that the board, care and nursing were furnished by plaintiff at the request of testator and with the expectation upon plaintiff's part to receive and upon the testator's part to make payment for the same.

*H. Hale*, for *applt.*

*Waldo & Grover*, for *respt.*

*Held*, That the referee's finding should be sustained. The kinship was remote and only by affinity as to plaintiff and we do not think that the entertainment he furnished was prompted by motives of affection or family regard. The idea of compensation seems to have been controlling and we think a contract should be implied. 8 Hun, 87. It is urged that the recovery, if any, should have been by the wife. She owned the house. The husband was a blacksmith and supported the family. She performed the household services. Testator sought the consent of both to become an inmate of the family. There is nothing to indicate an intention upon her part to

separate her earnings from those of her husband. There is nothing to overthrow the presumption that what she did about the household she did as wife and not separately upon her contract with testator. 4 Hun, 171; 64 N. Y., 589; 93 id.; 18.

Objection is made to the evidence showing that testator was worth \$11,000. We think this was material upon the question of the terms upon which he entered the family. It appeared that when able testator did a little work about the house and sometimes bought a few supplies; and it was urged by the defense that in this way he intended to make good his remark that plaintiff should be well paid. In determining the question we think the fact that testator was a man of comparative wealth might be taken into consideration. 17 Hun, 137.

Costs should not have been awarded. The claim was too large and the executor properly resisted it. It was reduced about one third. Code, §§ 1835-6; 32 Hun, 481.

Judgment modified by striking out costs and disbursements and as modified affirmed, without costs of appeal.

Opinion by *Landon, J.*; *Bockes, J.*, concurs; *Learned, P.J.*, dissents.

#### DEEDS. EASEMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elizabeth Griffiths, *respt.*, v. Edward A. Morrison et al., *appls.*

Decided May 8, 1885.

Plaintiff was the owner of two lots in the City of N. Y. known as numbers 141 and 143 West 49th street, each twenty-two feet in breadth and one hundred feet four inches in depth. A small structure was built upon the rear of lot No. 141, which did not cover the whole breadth of the lot. Subsequently a structure was built upon the rear of lot No. 143, which covered the whole breadth of that lot and extended 5 feet 8 inches over the line of lot 141 and up to the west wall of the structure upon the latter lot, which formed the easterly wall of that upon lot 143. The walls of the building on lot No. 143 were not keyed to the walls of that upon lot No. 141, and its beams rested upon piers. Plaintiff conveyed lot No. 143 by deed, describing it as 22 feet front and rear by 100 feet 4 in. in depth, with the buildings and improvements thereon, together with the appurtenances. *Held*, That the grantee derived no right under this deed to occupy the 5 ft. 8 in. of lot 141 over which the structure upon lot 143 extended.

Appeal from judgment in favor of plaintiff upon verdict directed by the court.

Previous to April 1st, 1882, plaintiff was the owner of two lots of land in the City of N. Y. known as numbers 141 and 143 West 49th street, each 22 feet in breadth and 100 feet 4 inches in depth. Upon the rear of lot No. 141 there was a small structure which did not cover the whole breadth of the lot; and subsequently a structure was erected upon lot No. 143, which not only covered the whole of the rear of that lot, but extended about 5 feet 8 inches over the line of lot 141 and up to the west wall of the structure erected thereon, which therefore formed the east wall of the building upon lot No. 143. The walls of the structure upon lot No. 143 were not, however, keyed to the westerly wall of the building

on lot No. 141, and its beams rested upon piers. Subsequently, plaintiff conveyed lot No. 143 to one L., by deed, describing it as 22 ft. front and rear by 100 ft. 4 in. in depth, with the buildings and improvements thereon, together with the appurtenances. Defendant derived title to lot No. 143 from L., and claimed the right, under his deed, to occupy the five feet eight inches of lot No. 141, over which the structure upon lot No. 143 extended. This action was brought to eject him therefrom.

*James J. Thomson*, for appls.

*Samuel Jones*, for resp't.

*Held*, That it was evident from the language of the deed describing the land granted as being 22 ft. in breadth and 100 ft. 4 in. in depth, that there was no intention to allow the grantee any more land than that; and it was apparent from the manner in which the rear building was constructed upon lot No. 143 that there was no intention to make that portion of the building extending over lot 141 a part of the premises known as 143.

That in a grant or demise the addition of the word "appurtenances" will not vary the effect of the grant or extend it so as to include other lands not parcel of the house and close mentioned, and it will not pass any corporeal real property, but merely incorporeal easements, rights, or privileges.

That easements exist as appurtenant to a grant of lands, and as arising by implication only by reason of a necessity to the full enjoyment of the property granted, 62 N. Y., 526, and that, for the enjoy-

ment of the rear building on lot No. 143, there was no necessity for the use of the walls of the house on the rear of lot No. 141 to sustain the structure upon 143. 21 N. Y., 506; 18 id., 51; 64 id., 437; 50 id., 648; 17 Mass., 441; 68 N. Y., 62.

Judgment affirmed.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

### SURROGATES. INTEREST.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*In re* Owen T. Coffin, Surrogate.

Decided May, 1885.

While a surrogate is not chargeable with interest on a fund received and simply retained by him for distribution, yet where he places such fund where it draws interest such interest becomes a part of the fund, belongs to the beneficiaries, and the surrogate will be required to pay it over with the principal.

For the purpose of carrying into execution the provisions of Chap. 350, Laws of 1884, the General Term of this department at the September term, 1884, appointed a referee to examine the books and accounts of the Surrogate's Court of the county of Westchester and report thereon.

The statute requires in each case an examination as to the moneys and securities in the hands of the surrogate or his court; the names of the estates or persons to whom credited; the original amount; when and by whose order paid in; the payments made and to whom; \* \* the amount of any accrued interest on each account so found and the

balance of each account then in his hands and where deposited or in what securities invested. The statute further provides that after confirmation of the referee's report the surrogate shall pay over and transfer to the county treasurer the moneys and securities on deposit with him in trust for the several estates and persons to whom the same are payable as appears by said accounts of the surrogate so approved.

The referee made his report to the court at the December term, 1884, stating in detail all the facts required to be found and that there remained at the date of his report, Dec. 8, in the hands of Owen T. Coffin, surrogate, the sum of \$11,889.51. The report was approved and an order made and transmitted to the surrogate and he obeyed the same so far as to transfer to the county treasurer all the securities deposited with him and the principal of all moneys so held by him, but failed to pay the interest which he had received on moneys which had been under his control and which was found by the referee to amount to \$1,470.91.

Thereupon the surrogate moved in Feb., 1885, to modify the order confirming the report so that it may direct the payment by the surrogate to the county treasurer of the principals or balances of the moneys, or confirming those so made, without interest thereon, except the balance of proceeds of the sale of the estate of J. H. Pine, deceased, amounting to \$1,631.45, which have been distributed and paid, and also striking from the re-

port the sum of \$157 as belonging to the estate of Henry Muller, deceased, which was paid before the date of the report.

A decree was made in Dec., 1884, for the distribution of the Pine estate, but when the surrogate was about to pay the money he informed the person who was to receive it of the existence of the referee's report which charged him with interest and that he intended to question his liability therefor, and that person elected to receive the money without the interest, amounting to \$372.44, which the surrogate retained. The surrogate states in his affidavit that the \$157 in the Muller estate was paid over on the 5th or 6th of Dec., 1884. Another estate was received by the surrogate in Feb., 1871, and distributed in Sept., 1873, the money being deposited in the meantime with a Trust Co. and drew interest, which was credited to the deposit, of \$107, which was also retained by the surrogate.

The reason assigned by him for retaining the interest moneys is that the moneys on which it accrued came into his office for distribution and his only duty was to retain them for that purpose.

*Held*, That the facts shown entitle the surrogate to an omission of the principal sums in the Pine and Muller cases from the report.

*Also held*, That his claim as to the interest is untenable. So far as the duty of the surrogate goes in relation to distribution that is the statutory requirement, and if he had held the moneys during the six weeks required for notice and

distributed the money then without interest when none had accrued his whole duty would have been performed. He would not be required to pay out more than he received. But the case presented is not that, nor like that. Here the surrogate received the money but it was not called for and he put it to usance where it earned interest which accumulated and was credited to the principal and became thus a part of the trust fund in his hands or under his control and belonged to the beneficiaries the same as the principal, and he is required to pay over all that he has received.

The law under which these proceedings were instituted plainly contemplated a case like this, for it required the referee to report the amount of any accrued interest on each account or fund and the balance of such account then remaining in the hands of such surrogate. Clearly the amount of accrued interest was to be rendered in the balance of the account, else its ascertainment would be an idle ceremony, and the balance of such account remaining in the hands of the surrogate is the amount which by § 4 of the act he is required to pay over and transfer to the treasurer of the county, because that is the amount appearing by the accounts of the surrogate.

By what rule of law or ethics can the surrogate separate the principal from the accrued interest and pay over the one and retain the other? How does he obtain any personal right or title to the accrued interest? We have been

referred to no authority to justify the claim of the surrogate and we have found none. In his argument he claims the right under a possession, but if that was sufficient it would enable him to retain the principal likewise, for he had the same possession of both.

Our conclusion is that the surrogate must obey the first order and pay over the interest found due by the report, including that of the two cases where he has paid over the principal and retained the interest.

Order modified by the omission of the principal in the cases of Pine and Muller and motion otherwise denied.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

## JUDGMENT. JOINT DEBTORS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Daniel S. Coonley, *respt.*, v. Elijah W. Woodruff, *applt.*

Decided May, 1885.

One of the makers of a joint and several promissory note was sued upon it by the holders and judgment entered against him only. He subsequently transferred to the holders a bay mare, without any agreement as to the price it was to be received at: the holders agreed that the mare should be taken in satisfaction of the judgment as to the maker sued, in any event, that they would sell the mare and after deducting the costs incurred would apply the balance *pro tanto* in satisfaction on their claim on the note under the judgment against the other maker. *Held*, That by the transfer of the mare the judgment was satisfied as to both makers.

Defendant and one Smith Wood made and delivered a promissory note for \$80 payable to Baker & Wood. The payees transferred the note to Coonley & Smith. After maturity the latter brought an action in this court against both makers, but served the summons on Smith Wood, and on default entered judgment against him only. Plaintiffs took supplementary proceedings against him and he gave them a mare. Plaintiffs endorsed upon the note "Received of Smith Wood one bay mare in satisfaction of judgment against him only." The plaintiffs in that action sold the mare for \$55. The surviving plaintiff now claims that only to the extent of \$55 was the judgment reduced and now brings this action against defendant.

He recovered.

*Gilbert & Kellar*, for applt.

*Hobbs & Kilburn*, for respnt.

*Held*, That by receiving the mare in satisfaction of the judgment against one maker, no sum being agreed upon as the value of the mare when she was received, the judgment was satisfied as to both makers. 7 Wend., 301; 1 T. & C., 651; S. C. 58 N. Y., 623. The referee has found the judgment was satisfied as to Smith Wood; that Coonley & Smith further agreed to sell the mare and apply the proceeds after deducting the costs in the judgment upon the note against this defendant, the other maker, and so to satisfy the note only *pro tanto* as to him. But no price was agreed on for the mare and it was agreed to be taken in satisfaction. It is of no conse-

quence whether Coonley & Smith made or lost upon her sale. If the judgment was satisfied the debt was satisfied and nothing remains to be paid.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

## CORPORATIONS.

### N. Y. COURT OF APPEALS.

*Kirkland v. Kille*, impl'd.

Decided June 16, 1885.

Where the affairs of a corporation are in such condition that the object for which it was formed is destroyed and there is neither an ability or intention at any time to further prosecute its business it ceases to be a company carrying on business within the meaning of the statute and the direction as to filing an annual report does not apply.

Reversing S. C., 16 W. Dig., 227.

This action was brought to recover from defendant K. and others, as trustees of a company organized under the General Manufacturing Act of 1848, Chap. 40, a debt of the company, for the payment of which plaintiff claims the trustees have become jointly and severally liable by reason of a failure to file and publish the annual report of the company within the first twenty days of January, 1876. The company in question was formed in 1874 for the purpose "of carrying on a mining, smelting and metallurgical business, to accumulate, conduct and supply water for mining purposes." Its capital was fixed at \$500,000, but none was paid nor subscribed. The whole was transferred in pay-

ment for mining property, smelting works, water works and mining property once owned by a mining company. In January, 1876, the time of the failure to make a report complained of, the condition of the company was such that the end and object for which it was formed were destroyed, and there was neither an ability nor an intention on its part at any time to further prosecute its business.

*Samuel Hand*, for plff.

*Thomas H. Hubbard*, for deft.

*Held*, That the company had ceased to be a company "carrying on business" within the terms of the statute, and the direction of the statute as to the filing of an annual report has no application.

Judgment of General Term, affirming judgment for a portion of plaintiff's claim, reversed, and new trial granted.

Opinion by *Danforth, J.* All concur.

#### PUBLICATION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

*Geo. W. Chase v. Elizabeth Lawson et al.*

Decided May, 1885.

*Affidavits* showing that the defendants to be served are residents of other states and that they are at the time at their respective places of residence are sufficient to show that such defendants cannot after due diligence be found within the state and to support an order for service by publication.

Appeal from order directing a purchaser on foreclosure sale to complete his purchase.

The purchaser's refusal to complete was made on the ground that the affidavits on which an order for service by publication was founded were insufficient to confer jurisdiction on the court to make the order.

These affidavits consisted of one by one W. that he had learned from one T. that E. H. C. and A. C. resided in the City of Philadelphia, in the State of Pennsylvania, and that E. L., C. L., and S. L., his wife, and C. L. reside at Danbury, in the State of Connecticut, and that T. is a brother-in-law of E. L., and one by plaintiff's attorney, stating on information and belief that said defendants are not residents of this state, but reside at the places stated in W.'s affidavit; that his sources of information are said affidavit of W., who was employed by deponent to ascertain the residence of said parties; that said defendants cannot after due diligence be found within the state, and that deponent is informed and believes that said defendants are now at the places above stated.

*L. C. Wakeman*, for applt.

*W. R. Woodin*, for resp't.

*Held*, That the order of publication was a valid one; that there was proof by these affidavits that these defendants could not after due diligence be found within this state. 31 Hun, 157.

What is suitable and proper diligence may depend somewhat upon the peculiar facts and circumstances of each case. The statute uses the well understood term "due diligence," which intends not diligence extraordinary or ex-



treme, but only proper and suitable. In this case the affidavits show no effort to secure personal service of the summons in this state, but proof is made to show that no diligence would result in such service, and that plaintiff would be unable to make such service because the defendants to be served were then not only non-residents of this state and residents of the states of Pennsylvania and Connecticut, but were actually located and living at their respective places of residence within those states. If this statement is to be accepted as proof of the fact, then proof of any effort to make personal service in this state was unnecessary, because it thus appears that it would have been unavailing and that plaintiff would have been unable with any extent of diligence to make such service, and that these defendants could not after due diligence be found within this state, and the law will not require a vain attempt or idle effort. When this last fact appeared by the affidavit the judge obtained jurisdiction to make the order. It is true that the fact of inability to find defendant within the state to make personal service must usually be manifested by proof of effort, but yet the statute prescribes no form of proof, and any fact showing that plaintiff will be unable to make personal service within the state will suffice. So the fact thus stated had a legal tendency to make a case and lay the foundation for the order of publication, and that is sufficient to authorize the judge to make it. 2 T. & C., 491. It

was therefore valid and safe from collateral attack. 3 N. Y., 46.

It is true, the fact that defendants to be served were at the time at their respective places of residence out of this state is stated by the attorney on information and belief, but he had employed W. to ascertain their residences, and so had made efforts to procure correct information on the subject.

Allegations on information and belief respecting the residence of these defendants were proper to be considered on the application for the order. 74 N. Y., 69; 39 How., 393.

Order affirmed, with costs.

Opinion by *Dykman, J.*; *Pratt, J.*, concurs; *Barnard, P.J.*, not sitting.

#### DRAFTS. ATTACHMENT.

##### N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James Naser and Peter Bowe, sheriff, v. The First National Bank of the City of N. Y.

Decided May 8, 1885.

D. & Co., a London firm, drew a draft upon N., a merchant in N. Y., and delivered the same to McC. & Co., a London banking firm, for transmission to N. Y. for collection. McC. & Co. forwarded such draft to the First National bank of N. Y., which collected it from N. Held, that thereby the First National Bank became the debtor of D. & Co. for the amount of the draft and not of McC. & Co., and that such debt was subject to levy under an attachment against the property of D. & Co.

Exceptions to be heard in the first instance at General Term.

The plaintiff, James Naser, and

the firm of Dennecker & Co. of London had dealings together, in the course of which Dennecker & Co. drew a draft dated at London on plaintiff for £817 9s. This draft was delivered by Dennecker & Co. at London to the firm of McCulloch & Co., bankers of that city, who had no other business with Dennecker & Co. than to forward this draft to N. Y. for collection. McCulloch & Co. transmitted the draft to defendant, stating that at the request of Dennecker & Co. they inclosed certain documents to which they requested defendant to give its attention. In the meantime Naser had commenced an action against Dennecker & Co., in which he had procured a warrant of attachment. Naser subsequently paid the draft drawn upon him by Dennecker Co. to defendant, and attempted to attach the proceeds thereof as the property of Dennecker & Co. in the hands of defendant, which claimed that it had no property of Dennecker & Co., but that it was the debtor of McCulloch & Co. Thereafter judgment was obtained by Naser in the action against Dennecker & Co. brought by him, and this action was thereupon commenced by leave of court to reduce into the possession of the sheriff the proceeds of the draft paid by Naser to defendant. The court at trial term directed a verdict for defendant, on the ground that no debt was shown to be owing from defendant to Dennecker & Co., but that so far as defendant was concerned the debt was shown to be due McCulloch & Co.

*Samuel Untermeyer*, for plffs.  
*Fisher A. Baker*, for deft.

*Held*, That McCulloch & Co. had no interest whatever in the draft or any part of it, and that all they undertook to do was to send it away for collection, and that the title to the draft and its proceeds remained absolutely in Dennecker & Co., in whose favor it was drawn and by whom it was transmitted. 1 Peters, 25; 3 Hill, 560; 23 Pick., 330; 6 Conn., 528; 7 N. Y., 459.

That defendant was the agent of Dennecker & Co., and by the payment of the draft became their debtor, and the money which was employed for the payment of the draft, therefore, as soon as it was paid to the bank, became subject to the attachment issued by plaintiff in his suit against Dennecker & Co.

*Farmers' & Mech. Bk. v. Butchers' & Drovers' Bk.*, 2 Com., 126; *Costigan v. Newland*, 12 Barb., 456, distinguished.

Verdict set aside and new trial ordered.

Opinion by *Brady, J.*; *Daniels, J.*, concurs.

#### DURESS. ATTORNEYS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

*Henry E. Fisher, respt.*, v. *Enoch Bishop et al, appls.*

Decided April, 1885.

One who assumes to act as the legal adviser of another and receives his confidence as such is to be held to the same accountability for his acts, threats and conduct by

which he secures an advantage to himself as would be required from an attorney. One W., who had, although not an attorney, acted as the legal adviser of plaintiff and his son and had drawn conveyances from the son to plaintiff, was also bondsman for the son, who defaulted and absconded. W. and B. thereupon by means of threats that they would set aside the conveyances as fraudulent procured from plaintiff a bond and mortgage to indemnify them for their liability. *Held*, That the bond and mortgage were procured by duress and were void.

Appeal from judgment entered on decision of Special Term.

Action to set aside a bond and mortgage executed by plaintiff and wife to defendants on the ground that they were obtained by fraud and duress.

It appeared that defendant, who had for many years been a justice of the peace and had acted as legal adviser for plaintiff and his son, using his knowledge of law to carry out his advice and prepare the papers, drew a deed and transfers of personal property from the son to the father, which were executed by the son to secure the debts to and liabilities his father had incurred for him, which securities were not sufficient for that purpose. About this time the son, being a defaulter to the N. Y. & O. M. RR. Co., absconded and left defendants liable as sureties on his bond to the railroad company for \$500, which they were obliged to and did pay. As soon as defendants found that they were liable for the son's default they immediately made efforts to induce plaintiff to indemnify them against any loss, threatening that unless the bond and mortgage in

suit were executed they would set aside the conveyances above mentioned, and they finally secured its execution.

The trial court, after finding duress in fact, found as conclusion of law that the bond and mortgage were executed under such threats of W. and that they were executed under duress of mind through fear and are illegal and void.

*W. H. Johnson*, for appls.

*W. & G. W. Youmans*, for resp't.

*Held*, No error. W. had assumed to act as a legal adviser of plaintiff; he had received from him the same confidence which exists ordinarily between client and counsel; he therefore should be held to the same accountability for his acts, threats and conduct in respect to the transaction out of which the mortgage and bond arose that would be required of an attorney. 41 Barb., 318; 41 N. Y., 619. A confidential relation existing between parties requires the greatest care, and transactions between parties when such a relation exists must be scrutinized closely and condemned unless shown to be fair and above board, and unless the client or injured party had equal knowledge and opportunity to protect himself. 26 Hun, 191. See also 3 Abb. Ct. of App. Dec., 210; 11 Paige, 538; 5 Den., 640; 13 Ves., 138.

In considering the evidence before the trial court it must be borne in mind that a mere threat of legal proceedings is not enough to make out a case of duress. 85 N. Y., 615. Nor that a party intends to insist upon his legal rights.

86 N. Y., 473; 30 Hun, 239. The case last cited, however, adds what we deem pertinent and potential in this case. Judge Smith, who spoke for this court in that case, said, "But we think that when threats of a lawful prosecution are purposely resorted to for the purpose of overturning the will of the party threatened, by intimidating or terrorizing him, they amount to such duress or pressure as will avoid a contract *thereby obtained*. *Eadie v. Sherman*, 26 N. Y., 9, as we understand the report of the case, is in point. See also 83 N. Y., 253.

Though the threats were made during three days prior to the execution of the papers, they may be considered and also the fact that the action to set aside the papers was not brought until some six years after their execution may be considered by a jury or court in

determining whether there was actual duress or not. Neither circumstance standing alone, or both standing revealed as they do by the evidence, is sufficient to warrant us in saying as matter of law that no duress was made out at the trial.

That, considering all of the evidence, W. and B. took undue advantage of plaintiff, and by means thereof and the duress found secured to themselves the bond and mortgage. Plaintiff was not liable for the defalcation of his son, and by means not warranted was induced to execute the papers. Defendants technically are entitled to the \$1 which they advanced.

Judgment modified by deducting \$1, and as modified affirmed.

Opinion by *Hardin, P.J.*; *Boardman, J.*, concurs; *Follett, J.*, not sitting.

END OF VOLUME TWENTY-ONE.

# INDEX:

## ABANDONMENT.

1. Chap. 171, Laws of 1882, amending Chap. 395, Laws of 1881, has relation only to abandonment in the County of Kings, and does not authorize proceedings against a husband who abandoned his wife in another state, although she afterward moves into Kings County.—*The People ex rel. Drake v. Bergen*, 512.
2. The words "leaves them" in said statute refer to the original leaving.—*Id.*

## ABATEMENT.

See DIVORCE, 2; NEGLIGENCE, 22; SLANDER, 1.

## ACTION.

See ASSIGNMENT, 8; ATTORNEYS, 2, 7, 8; BANKS, 4; CHARTER PARTY, 2; CHECKS; CONVERSION, 8; CORPORATIONS, 5, 9; CREDITOR'S ACTION, 7; GUARDIAN, 2; LEASE, 8; NEGLIGENCE, 7; PARTNERSHIP, 2; PERJURY; PRACTICE, 23; PROMISE; TOWN AUDITORS, 1; TOWNS, 1; WILLS, 10, 11.

## ADMINISTRATOR.

See EXECUTORS.

## AFFIDAVIT.

See ARREST, 2; ATTACHMENT, 5, 11, 12; TAXES, 4.

## AGENCY.

1. When a principal, intending to create a special agent with power to do a single act, negligently executes and puts forth a general power of attorney under which the agent acts, the principal is bound as between himself and a third person acting in good faith. *Dietrick v. The Firemen's Fund Ins. Co.*, 16.
2. A. had in his possession certain wheat which he treated as his own and sold to defendants, taking their note to himself for the price. Defendants supposed the wheat belonged to A., but his wife was the real owner. Defendant afterward purchased a note made by A., which they

proposed to set off against their note, held by A. On suit upon defendant's note, *Held*. They could not set off more than the amount they actually paid for A.'s note.—*Nichols v. Martin et al.*, 20.

3. If a factor sells in his own name as the owner and does not disclose his principal and acts ostensibly as the real and sole owner, the purchaser, if he *bona fide* dealt with the factor as owner, may set off any claim he may have against the factor in answer to an action on the contract brought by the principal, but when the buyer before the receipt and delivery of the articles purchased acquires such notice or information of the fact that the factor is not the owner of the goods as indicates the propriety of further inquiry as to their ownership and he fails to make such inquiry he is chargeable with knowledge of such facts as the inquiry would have disclosed and he cannot set up a claim against the factor in answer to an action brought by the principal.—*McLachlin et al. v. Brett et al.*, 132.

4. Plaintiff asked M., an attorney, whether he knew where she could invest \$2,000 on a first mortgage. He said he did not, but would let her know if an opportunity came. A few days after defendant went to M. and asked if he knew where defendant could get a loan of \$2,000. Defendant said there were two small mortgages on his farm; that he wished these paid but not cancelled, to be held as collateral security to the new \$2,000 mortgage. M. communicated with plaintiff, who said she would take only a first mortgage, to which M. replied that the two small mortgages should be paid and satisfied. Defendant executed the mortgage. M. gave him a memorandum of the transaction and withheld the sums due on the small mortgages, stating in the memorandum that the latter were to be paid and assigned to plaintiff. Plaintiff never saw defendant during the transaction and had no knowledge that the small mortgages were to be assigned and not satisfied. M. procured one to be as-

signed to plaintiff, the other was not so assigned and M. did not account to either party for the money in his hands to pay the other mortgage. *Held*, That M. was the agent of plaintiff and the loss must fall upon her.—*Plass v. Brusie*, 562.

See EVIDENCE, 16; FIRE INSURANCE, 5, 11; FRAUD, 6, 7.

#### ALIENS.

1. The heirs of a deceased resident alien and of his blood are capable under our statute of taking and holding land owned by him, whether they be citizens or aliens.—*Maynard v. Maynard et al.*, 547.
2. Where such alien heirs are males of full age they must make and file the deposition required by law, and until they do so they take a defeasible title.—*Id.*
- 3.—Where there are heirs competent to take the title in no case escheats to the State without the finding of an inquisition.—*Id.*

#### ALIMONY.

1. In an action for divorce, the court in exercising its discretion in granting an allowance should consider that in the end the party directed to pay money may be in the right and should provide as far as possible for such a contingency. It should ascertain what has been and will be the *quantum* and kind of litigation sufficient for the proper investigation of the issues.—*Uhlman v. Uhlman*, 282.
2. Where an allowance is asked for two counsel, the necessity for two counsel must affirmatively appear.—*Id.*
3. Modification of order as to amount does not necessarily carry a right to direction for repayment of excess.—*Id.*
4. Compliance with an absolute direction to pay is not taking a benefit under the order so as to prevent an appeal.—*Id.*
5. The possession of a separate estate by a wife will not deprive the court of the exercise of its discretion on her application, or absolutely bar her right to temporary alimony, but may be considered in measuring the allowance to be made.—*Merritt v. Merritt*, 337.

See DIVORCE, 1.

#### AMENDMENT.

See EXECUTORS, 1; PLEADING, 13, 14.

#### ANIMALS.

1. In an action to recover damages for injuries received from defendant's dog,

where it appears that the dog had previously bitten other persons and that defendant had notice thereof, evidence as to the peaceable conduct and disposition of the dog is inadmissible.—*Caldwell v. Snook*, 141.

2. The owner of a dog who permits it to follow her on the street is not liable for damages caused by its killing another dog while so following her.—*Buck v. Moore*, 217.

#### APPEAL.

1. Where a demurrer was stricken out as frivolous and served in violation of a stipulation, and judgment was obtained by default, *Held*, that an appeal from the judgment alone brought up nothing for review.—*Sloughton v. Lewis*, 18.
2. The respondent is not precluded from moving to dismiss by the fact that he placed the case on the calendar and noticed it for argument.—*Id.*
3. The respondent served a notice of entry of judgment to limit an appeal in this action. More than sixty days afterwards appellant served by mail notice of appeal to the General Term. After this respondent gave appellant a written extension of time to serve a case, and the latter went on and got ready for argument. Upon a motion to dismiss the appeal because not taken in time, *Held*, that the court would regard the extension of time to serve a case as a waiver of the notice of entry of judgment.—*Staats v. Garrett*, 89.
4. As neither the existence of Chap. 151, Laws of 1882, amending Chap. 361, Laws of 1881, nor the Comptroller's practice thereunder, was within the issues in the action or could affect its determination motion for reargument was denied.—*The People v. The Gold & Stock Tel. Co.*, 57.
5. An appeal from a judgment entered upon a verdict of jury raises questions of law only.—*Bates v. Riordan*, 134.
6. The only mode of reviewing the facts in such a case is by an appeal from an order granting or refusing a new trial.—*Id.*
7. The validity of an undertaking given under § 348 of the Code of Pro., depends upon its efficiency in securing to appellant the stay it was intended to enable him to obtain. The obligee cannot enforce such undertaking after repudiating it as a stay.—*Hemmingway v. Foucher*, 166.
8. A motion to set aside an order appointing commissioners was denied and an appeal taken. Pending the appeal another motion was made to set aside said order and also an order confirming the report, on the ground that the acts under which

- the proceedings were had were unconstitutional. This motion was denied and appeal taken, which was heard and the order of denial affirmed. The first appeal was then dismissed on the ground that appellants were concluded by the order on the second motion. *Held*, error.—*In reopening of Flushing Avenue*, 206.
9. An appeal will not lie to the Court of Appeals from an order of General Term, modifying an interlocutory judgment in a specified manner and affirming it as modified. The judgment entered on such order remains simply an interlocutory judgment.—*Weeks et al. v. Cornwell et al.*, 208.
  10. No appeal lies from an order denying a motion for judgment upon the ground that the answer is frivolous.—*Douglas v. Stockwell*, 256.
  11. An order of the county court granting or denying a motion for a new trial on the ground of newly discovered evidence rests in the discretion of the court, and is not reviewable by the Supreme Court.—*Myers v. Riley*, 280.
  12. In an action not founded on contract the sum for which the complaint demands judgment is to be deemed the amount of the matter in controversy within § 191 of the Code.—*Zoeller v. Riley*, 284.
  13. Where the Court of Common Pleas has affirmed a judgment of the City Court and judgment has been entered on its remittitur, an appeal to the Court of Appeals must be taken from the judgment rendered by the Common Pleas, and not from the judgment as entered.—*The Ansonia B. & C. Co. v. Conner et al.*, 304.
  14. Sections 3194, 3195, of the Code do not authorize an appeal to the Court of Appeals from a judgment of the City Court entered upon a remittitur.—*Id.*
  15. The Court of Appeals has power to restore in a summary manner only property or rights which have been lost by a judgment which it has reversed: it cannot interfere under § 1823 to restore property which has been taken and sold under other judgments, even where the effect of the reversal is to decide that such property was taken from the party legally entitled to it.—*Murray v. Berdell et al.*, 334.
  16. Where an appellant has little or no property and one of the sureties on his undertaking becomes insolvent, and the other is not of much financial ability, the respondent is entitled to a new undertaking.—*Mahon v. Noon*, 361.
  17. An appeal in a criminal action cannot be taken solely from an order denying motion to set aside the indictment, but such order may be reviewed on appeal from the judgment on conviction.—*The People v. Havens et al.*, 364.
  18. Plaintiff purchased certain boats at sheriff's sale subject to a mortgage of \$6,700. Plaintiff claimed that only \$5,700 is due on the mortgage, and brought action to redeem, alleging a tender of \$5,700 and an offer to pay any further sum that may be found due. The court found that \$6,700 was due and that plaintiff was entitled to redeem on paying that sum with interest. *Held*, That there was no ground on which an appeal by plaintiff could be upheld.—*The Keuka Nav. Co. v. Holmes*, 407.
  19. An appeal from an order of General Term granting a new trial in a criminal action will not lie to the Court of Appeals unless the order shows that the new trial was refused upon the facts and was granted only for errors of law.—*The People v. Poucher*, 410.
  20. An appeal will not lie to the Court of Appeals from an order of General Term reversing an order granting a mandamus in a case where, according to relator's contention, he has a sufficient remedy at law.—*The People ex rel. Dowdney v. Thompson*, 413.
  21. Whenever the character of the issues framed by the pleading is such that upon a new trial it would be possible for the defeated party to recover, upon a reversal the appellate court should award a new trial.—*Thomas v. The N. Y. Life Ins. Co.*, 443.
  22. In an action for conversion of personal property the answer set up a purchase from the executrix prior to the issue of letters testamentary and payment therefor. The trial court found these facts and rendered judgment for the value of the property. The General Term reversed this judgment and gave judgment for nominal damages. *Held*, Error; that it should have ordered a new trial.—*Id.*
  23. On appeal from a judgment in an action for services in negotiating railroad securities it appeared that the evidence as to the value of the services would not warrant the finding as to their value, and that no proof of their precise nature and extent was given. The General Term so found, but fixed the value at a lower sum and ordered judgment therefor. *Held*, that the General Term thereby exceeded its powers.—*Lyddy v. Chamberlain*, 497.
  24. Judgment was recovered against defendant for \$104 and costs and the present plaintiff was subsequently substituted on condition that he pay the attorney \$800. The attorney agreed to take \$680 and defendant paid him that sum in settlement

of the judgment. On motion to set aside an execution issued on said judgment it appeared that the attorney's compensation was fixed by the written stipulation of the parties. *Held*, That as the motion involved a question of fact an appeal would not lie to this court.—*Goddard v. Stiles*, 551.

See ALIMONY, 4; ATTACHMENT, 1, 2; BILL OF PARTICULARS; DEPOSITIONS, 4; EXECUTORS, 16; JUDGMENT, 1; MORTGAGE, 27; PARTITION, 2; PRACTICE, 2, 3, 6, 7, 15, 22, 24, 26.

#### APPRENTICE.

1. One McS., a minor, was apprenticed to plaintiff, but during the term left without plaintiff's consent and worked for defendant. The contract of apprenticeship contained the first and third covenants provided for in § 2 of Chap. 934, Laws of 1871. In an action to recover for the minor's services, *Held*, That plaintiff was not entitled to recover; that to do so he must show the existence of a valid contract of apprenticeship, and that the contract shown was invalid.—*Barton v. Ford*, 235.

#### ARREST.

1. An order of arrest granted upon affidavit stating facts sufficient to give the judge jurisdiction will protect against an action for false imprisonment the judge who granted it and the party who procured it and instigated its service, although such order be afterwards set aside on proof of extraneous facts. Even malicious motives and the absence of probable cause do not give a party arrested a cause of action for false imprisonment.—*Marks v. Townsend et al.*, 10.
2. An order of arrest for false and fraudulent representations should not be granted upon an affidavit in which the falsity of the representation is alleged upon information derived from a person named when it does not appear that an affidavit could not be obtained from such person.—*Richters et al. v. Littell et al.*, 133.
3. The practice of presenting a single set of affidavits entitled in several different actions by different plaintiffs against the same defendants, for the purpose of obtaining separate orders of arrest in each action, is not to be encouraged.—*Whitney et al. v. Hoffstadt et al.*, 197.
4. An application to exonerate bail is governed by the Code as it exists when the application is made.—*Walsh v. Schulz*, 215.
5. The right of bail to be exonerated upon the death of defendant is limited to cases where the death occurs before the expiration

of the time to answer in the action brought against the bail.—*Id.*

6. While it is the rule that where the ground upon which defendant is arrested is identical with the cause of action and must be established to enable plaintiff to recover upon the trial the order of arrest will not be set aside upon motion on conflicting affidavits unless the evidence is of such a character as would require the justice presiding at the trial to direct a verdict for defendant, still when a motion to vacate the order of arrest is made upon affidavits in such a case the administration of justice requires an examination pro and con, for the purpose of ascertaining whether the order was providently or improvidently granted.—*Sniffen v. Parker*, 444.

See EXECUTION, 1.

#### ASSESSMENTS.

1. Commissioners were appointed under Chap. 118, Laws of 1883, to ascertain the damages caused by change of grade in a street in Peekskill. Section 2 of that act provided the provisions of the General Railroad Act relative to the appointment of commissioners, their power and duties, should be applicable to the appointment of and the power and duties of these said commissioners. The defendant answered and denied the petitioner's title and the injury, and these were the only questions put at issue. On this appeal from the order appointing the commissioners and their award, *Held*, That the objection that, as the petition does not state that an effort had been made to settle or fix the amount of damages, the appointment was void by § 13 of the Railroad Act was frivolous, and even if it had been valid if made on the return of the petition it could not, as here, be raised for the first time on appeal; that the presumption is that the commissioners followed the correct rule of damages in fixing their award; that the question, "Without taking into account any benefits supposed to be derived from raising the grade, would it then be any injury to the property?" was properly allowed.—*Haight v. The Village of Peekskill*, 80.
- Where a portion of a street which is being graded under the direction of the street commissioner is filled higher than the established grade, but the entire work is afterwards accepted and approved by the common council, *Held*, That the change of grade was thereby ratified and that such ratification was sufficient.—*Moore et al. v. The City of Albany*, 338.
3. In making the street the contractor made excavations on the slopes outside



of the street lines upon private property, and also in filling ravines made embankments on private property outside the street lines, without the express consent of the owners of such property, for the purpose of securing the full width at grade. *Held*, That this would not render the assessment invalid; nor is it invalidated by the fact that the expense of constructing drains through such embankment outside the lines without the knowledge of the owners was included.—*Id.*

#### ASSIGNMENT.

1. Assignment to H. by an insolvent debtor of securities for payment for legal services to be performed by H. for the insolvent in the event of an assignment by the latter for the benefit of creditors, *Held*, to be a fraud on creditors of the insolvent.—*Swift et al. v. Hart et al.*, 22.
2. Where the securities so assigned were judgments which had been recovered by H. as attorney for the insolvent, *Held*, that H. still had his lien upon such judgments for his compensation and disbursements therein.—*Id.*
3. Upon refusal by the assignee to bring an action to reclaim property fraudulently assigned by the insolvent, creditors may sue in equity for that purpose, joining the assignee as defendant, and the proceeds of their recovery will be assets for distribution under the assignment.—*Id.*

See CORPORATIONS, 14; COSTS, 7; EVIDENCE, 19; MORTGAGE, 23.

#### ASSIGNMENT FOR CREDITORS.

1. A general assignment for the benefit of creditors, made by the members of a partnership including both the partnership and their individual property, and containing a provision that, out of the remainder of the assets, if any, after paying the partnership debts, the assignee should pay their individual debts, or, if such remainder should be insufficient, should apply the same *pro rata* to the payment of such individual debts, is fraudulent when the individual property and liabilities of the assignors are unequal, for the individual property of each assignor should be applied to the payment of his individual liabilities; and such an assignment may be set aside in a suit brought for that purpose by a judgment creditor of the copartnership.—*Crook v. Rindskopf et al.*, 80.
2. When a general assignment for the benefit of creditors contains a fraudulent direction, any creditor, even though the fraudulent direction itself may not

directly prejudice him, is entitled to relief under the general provision of the statute declaring an assignment made with the intent to hinder, delay or defraud creditors to be void as against the persons so hindered, delayed, or defrauded, for every creditor is so delayed and and hindered by such an assignment, inasmuch as it stands in the way of the ordinary legal proceedings provided for the collection of debts.—*Id.*

3. In order to make a general assignment for the benefit of creditors effectual and operative as a conveyance of real property in the City of New York, as to subsequent purchasers in good faith of such property from the assignor, it must be recorded as a deed in the office of the Register of Deeds of the county of N. Y., and when such a subsequent purchaser in good faith mortgages such property a purchaser at the foreclosure sale of such mortgage acquires the title of the mortgagor notwithstanding the fact that he has notice of the assignment.—*Wagner v. Hodge et al.*, 125.
4. The certificate of acknowledgment of a general assignment, which was written immediately after the clauses of acceptance of the trust and of attestation and the signatures and seals of the parties, was as follows:—"State of N. Y., City and Co. of N. Y., ss: On this 21st day of Feb., 1882, before me personally appeared C. H. S. and J. G. S. of the City of N. Y., to me personally known to be the individuals described in and who executed the same and who acknowledged to me that they executed the same for the purposes therein mentioned." *Held*, That while the certificate was defective in form it was not vitally so, and that the assignment was properly recorded.—*Claflin et al. v. Smith*, 236.
5. In an action to set aside the assignment upon the ground that the above certificate of acknowledgment was defective the officer who took such acknowledgment was called to prove that in fact the requirements of the statute in respect of the act of acknowledgment had been complied with. This evidence was excluded. *Held*, Error.—*Id.*
6. An order for the examination of the assignor will not be denied, or if granted will not be vacated, on the ground that such examination may develop fraudulent transactions on the part of the assignor and assignee sufficient to set aside the assignment.—*In re assignment of Wilkinson et al.*, 265.
7. Where the petition shows that there is reasonable ground for apprehending that there has been a fraudulent disposition of assets, or a fraudulent omission thereof

from the inventory, or that fraudulent claims have been placed upon the schedules, an examination should be ordered.—*Id.*

8. If by inadvertence or mistake any of the creditors or claimants have received more than their share of the fund the County Court, on the accounting of the assignee, has power and authority to order its restoration so that it may be properly distributed, and to enforce its order.—*In re accounting of Morgan*, 841.

See ASSIGNMENT, 3; CREDITOR'S ACTION, 5, 6; LEASE, 14; MORTGAGE, 4; NEGOTIABLE PAPER, 10.

#### ASSOCIATIONS.

1. Where the pleader intended to sue a joint stock association and yet omitted to name the President or Treasurer or the individuals comprising it, a general appearance of defendant waives this defect. It is however incumbent on plaintiff to prove the existence of such association by competent evidence, as this question is sufficiently put in issue by the general denial.—*Brooks v. The Farmers' Creamery Ass'n*, 58.
2. Where there is no allegation in the complaint that defendant was a corporation, a specific denial is not necessary in the answer.—*Id.*
3. One Thompson was alleged to be superintendent and manager of defendant, and he appeared and answered as such. The merits were all with the plaintiff. The judgment was, under § 3063 of the Code, affirmed in favor of plaintiff notwithstanding technical errors.—*Id.*

#### ATTACHMENT.

1. It is doubtful whether an order increasing the security required upon an attachment is appealable to the General Term.—*Riggs v. The C., Y. & P. RR. Co.*, 45.
2. The amount of security required upon an attachment is in the discretion of the Court or Judge and an order fixing it will not be interfered with upon appeal, unless such discretion has been abused.—*Id.*
3. It is not an abuse of such discretion to require an undertaking in the sum of \$5,000 upon an attachment of certain bonds of a foreign corporation in which defendant's interest, assuming them to be of par value, is \$163,563.60 although, their real value is uncertain and is probably much less than par.—*Id.*
4. The appointment of a foreign receiver of the corporation issuing the bonds on the ground of its insolvency is no reason for vacating an order previously made, fixing such security.—*Id.*

5. An affidavit for an attachment, under Code, § 636, stated that at the time the debt was contracted defendant falsely stated to plaintiff the amount of her indebtedness; that her property was insufficient to pay the true amount of her indebtedness; that she had refused to pay this debt and had stated to plaintiff that she was about to assign her property to relatives whom she owed; that she had discontinued her former business and was not engaged in business. *Held*, That the affidavit was defective and that no attachment should have been issued upon it.—*Carpenter v. Wood*.—145.

6. Defendant, with knowledge that a railroad company which was a depositor was embarrassed, and that attachments were being issued against it, certified a check of the company for the balance of its deposit, payable to R., its assistant treasurer. An attachment against the company was served on the bank, and thereafter R. deposited the check to his individual account and drew out the proceeds. *Held*, sufficient to sustain a finding that defendant had reason to and did believe when the deposit was made that it was the property of the company; that it was the duty of defendant upon being served with the attachment to take immediate steps to impound the fund in its hands, and prevent payment by any of its agents except to a bona fide holder of its obligations.—*Gibson et al. v. The Nat'l Park Bk.*—147.

7. The service of the attachment did not create a lien on the moneys deposited.—*Id.*

8. Where the clerk of the deputy signs the certificate under directions from the latter, his act is to all intents and purposes the act of the deputy, and valid.—*Id.*

9. Where there has been a substitution of parties plaintiff upon the death of one, proof of the facts showing a right to substitute is not necessary upon the trial.—*Id.*

10. A person who has acquired a lien upon or interest in property after it has been attached may found a motion to vacate the attachment upon the insufficiency of the papers upon which the warrant was granted.—*The Marine Nat'l Bk. v. Ward et al.*, 176.

11. An affidavit made for the purpose of obtaining an attachment in an action in which a national bank is the plaintiff is not sufficient for that purpose when it is made by a person who is stated to be the vice-president and a director of plaintiff, but who is not shown to have had any special knowledge of or connection with the business affairs of the bank beyond what is implied by said statement, and

the allegation in regard to counterclaims is that the plaintiff is as deponent is informed and verily believes, entitled to recover of the defendants the sum of \$700.-000 over and above all counterclaims known to the plaintiff or to deponent."—*Id.*

12. In order to warrant the granting of an attachment upon the ground that the defendant has made a fraudulent conveyance of a portion of his property, such fraudulent conveyance must be shown by something more than allegations merely upon information and belief.—*Id.*
13. After the assignment of a chose in action by a defendant it cannot be seized through the instrumentality of an attachment issued against him.—*Hamburger et al. v. Baker*, 213.
14. An action for damages for the conversion of personal property is within sub. 2 of § 635 of the Code of Civ. Pro., and is one in which plaintiff is entitled to an attachment; and the fact that the same complaint contains a statement of another cause of action, plainly referring to the sale of the same goods, for damages for the sale and delivery of the said goods induced by false and fraudulent representations, will not deprive plaintiff of his right to said attachment.—*Gladke et al. v. Maschke*.—281.
15. The only essential part of a certificate given by one possessing property of a debtor against whom an attachment has been issued is that showing the balance due to him; the dates and items of the account are admissions which may be used as evidence, but are open to explanation, and the person giving it is not estopped from showing a mistake as to them.—*Almy et al. v. Thurber et al.*, 533.
16. D. & Co., a London firm, drew a draft upon N., a merchant in N. Y., and delivered the same to McC. & Co., a London banking firm, for transmission to N. Y. for collection. McC. & Co., forwarded such draft to the First National Bank of N. Y., which collected it from N. *Held*, that thereby the First National Bank became the debtor of D. & Co. for the amount of the draft and not of McC. & Co., and that such debt was subject to levy under an attachment against the property of D. & Co.—*Naser et al. v. The First Nat'l Bk.*, 573.

#### ATTORNEYS.

1. There is no presumption that counsel have personal knowledge of the truth or falsity of affidavits presented by them in court.—*Woodbridge v. Cook et al.*, 94.
2. In the absence of any evidence of such knowledge an action does not lie against

an attorney for conspiring to procure the discharge of a judgment debtor, on the ground that the affidavit of service of the notice of the motion for such purpose on the creditor's attorney was false.—*Id.*

3. A reference of an action on an attorney's bill should be ordered in a proper case.—*Gregory v. Seaman et al.*, 214.
4. As between the original parties to the transaction a manual delivery of shares of stock is sufficient, without a formal transfer, to support a lien thereon for the purpose of which the delivery was made; and this rule holds good as against a receiver in supplementary proceedings of the property of the party making the delivery.—*Corey v. Harte*, 247.
5. Where an attorney receives from his client shares of stock as security for professional services, and upon demand of a receiver of his client's property appointed in supplementary proceedings delivers the same to said receiver with a written notice of his lien thereon and takes a receipt therefor, he does not thereby surrender or waive his lien.—*Id.*
6. M., having moneys to invest, gave them, as alleged, to C., an attorney, for that purpose, who, on demand, failed to account for them. M. then began an action in which the attorney was arrested. The action is pending. Upon a separate application to the court for an order directing the attorney to pay over these same moneys, *Held*, That the matter was discretionary, and as an action was pending the order should be refused.—*In re application of M. v. C.*, 297.
7. When it is agreed between plaintiffs in an action and their attorney that the latter is to receive one-tenth of the recovery together with the costs and allowances, he has the right to prosecute the action to secure his compensation, and he cannot be deprived of this right by an agreement with defendant, entered into by plaintiffs without his consent, not to further prosecute the same.—*Forstmann et al. v. Schulting*, 358.
8. It is not necessary for the attorney, in such a case to procure leave of the court to continue the prosecution of the action.—*Id.*
9. General authority to an attorney to collect does not imply the right to receive an assignment of personal property in payment of the debt.—*Sheridan v. Farnham*, 470.
10. Section 66 of the Code is not designed to prevent litigants from fairly settling their suits without their attorney's assent, but simply to protect attorneys from be-

ing deprived of their compensation by settlements which deprive them of the means to recover it.—*In re Tuttle v. The Village of Cortland*, 528.

11. A settlement made in good faith by the parties will not be set aside at the instance of the attorney of one of them where it appears that the sum agreed to be paid under the settlement to his client exceeds the amount necessary to satisfy his lien, and especially where the opposite party has offered to pay his claim directly to him.—*Id.*

See AGENCY, 4; ASSIGNMENT, 1, 2; CORPORATIONS, 28; FRAUD, 2.

#### BAIL,

See ARREST, 4, 5.

#### BANKRUPTCY.

1. An assignee appointed by a foreign court in bankruptcy proceedings taken *in invitum* acquires no title to property of the bankrupt beyond the limit of the court's jurisdiction. And this is so, whether the question arises between the bankrupt and the assignee, or between the assignee and creditors of the bankrupt residing in this State.—*In re assignment of Haynes et al.*, 461.

See BANKS, 8, 9; MORTGAGE, 5.

#### BANKS.

- 1. The knowledge of a director or stockholder of a bank will not charge the bank with notice unless he is acting for and in the business of the bank.—*The Discount & Deposit Bank v. Oosterhoudt et al.*, 25.
2. In 1865 Margaret Ganley deposited two Treasury notes with defendant for safe keeping, and took from its cashier a paper stating that they were to be delivered to her on surrender of the receipt. In 1866 her husband, without her knowledge or subsequent ratification, induced defendant, without producing the receipt, to sell the notes and pay over the proceeds to him, and purchased real estate therewith. She died in 1869, and no administrator was appointed until plaintiff was in 1879. The husband died in 1874. Plaintiff produced the receipt, and demanded of defendant the notes, which were refused. He then began this action. *Held*, That the action was not barred by the Statute of Limitations; that the statute began to run from the time of the demand, and not from that of the sale; that the fact that the husband, if living, would be entitled to a portion of the recovery is no defence, and that plaintiff, as administrator, was not obliged to resort to the real estate.—*Ganley v. The Troy City National Bank*, 305.

8. Three persons deposited with a bank and to her credit money of a woman, then insane, upon an agreement made with the paying teller that it was not to be withdrawn except in the presence of all three. No such agreement was entered in the pass-book and the teller had no authority to make such an agreement. Subsequently one of the three presented a check or order signed by the insane woman with her mark and witnessed by another person and also the pass-book. The subscribing witness' signature was identified and the bank paid. It had no notice of her insanity. *Held*, That the bank was protected; that the teller had no apparent authority, by virtue of his position, to make such an agreement as above stated, and that the bank was not put on inquiry by the circumstances of the deposit and its withdrawal.—*Riley v. The Albany Savings Bank*, 319.

4. The administrator of the insane person proceeded in a Surrogate's Court against the person who drew out the money and it was there adjudged that the money drawn out was the proper money of the insane person and was in the possession of the man proceeded against. *Held*, That the administrator had elected his remedy and could not thereafter bring this action against the bank for the same debt.—*Id.*

5. A deposit was made with defendant by a man who gave his name as S. and a pass-book was issued to him. Thereafter one V. being in prison, a stack of hay on his farm was sold, and at the bottom the pass-book was found, and afterwards given to V.'s administrator. A precise duplicate of this book was presented to the receiver of defendant by a man who answered the description of the depositor, and his signature comparing favorably with the original signature a dividend declared was paid to him. On a claim by V.'s administrators for said dividend, there was no evidence as to who S. was, or that there was such a person, nor that the book was ever seen in V.'s possession; there was evidence tending to show that the depositor's signature was in V.'s hand-writing. *Held*, That the burden was on the claimants to establish that V. made the deposit, and that the proof was not so conclusive that the court was bound to believe that he did; that the receiver was protected by his payment made with due care and diligence.—*The People v. The Third Avenue Savings Bank*, 414.

6. Under an arrangement between banks by which the bank collecting checks sent by the other is to remit any balance found due the other by draft on N. Y., less exchange, the collecting bank is not entitled to offset against the proceeds of a

check collected the amount of a check previously accounted for, the amount of which it has repaid on a claim that it was forged.—*Hall v. The Tioga National Bank*, 416.

7. The acceptance by an irretrievably insolvent bank of the deposit of drafts just before the final closing of its doors constitutes such a fraud as entitles the depositor to reclaim the drafts or their proceeds.—*Craigie et al. v. Hadley*, 425.
8. Neither the creditor of an insolvent bank nor its assignee in bankruptcy has any equity to have such deposit applied in payment of the obligations of the bank.—*Id.*
9. A repayment of such deposit does not constitute a preferential payment under the Bankrupt act.—*Id.*
10. A husband to quiet and appease his wife deposited money to her credit in the defendant bank and gave to her a bank book showing the deposit. At the same time he told the cashier it was his own money and he would let it rest in that way for a short time. The wife drew checks against the account which the bank paid and charged to her account. The wife died. The bank became insolvent. *Held*, That a perfect gift to the wife of the deposit was made out and that the husband could not reclaim the money as against other creditors.—*The People v. The State Bank of Fort Edward*, 432.
11. The words "a liability created by law," in § 394 of the Code, mean simply a liability created by some statute.—*Brinckerhoff et al. v. Bostwick et al.*, 468.
12. The liability of bank officers for negligence or misconduct is a common law liability arising from their relations to the bank and the manner in which they discharge the duties thereof, and an action thereon is subject to the limitation of ten years prescribed by § 388.—*Id.*
13. Where the endorser of a note, discounted by a bank and past due, gave to it as collateral security a mortgage upon an agreement that it would not sue him upon said note until it should ascertain, after the foreclosure of another mortgage which it held against the maker of the note, what sum would remain unpaid upon the note, *Held*, that this was a valid extension of time to the endorser and constituted the bank a holder for value of his mortgage.—*Durkee v. The National Bank of Fort Edward et al.*, 477.
14. Under an agreement that a president should be paid out of the net profits of a bank, to entitle him to salary it must appear that the profits were actually realized and not estimated. So where a bank

held government bonds which were worth more than their cost on a certain day and a calculation of the bank's assets and liabilities was made as of that day and the bonds, though not sold, were put in at their current price, whereby it appeared that there was a profit, and that the president was therefore entitled to salary, *Held*, that the method adopted was incorrect; that there having been no sale of the bonds there could not be, as to them, any net profit.—*Jennery v. Olmstead et al.*, 565.

See ATTACHMENT, 6, 7, 11; EXECUTORS, 14; JUSTICES COURT, 2; SURETYSHIP, 2.

#### BAR.

1. By the will of one M. a trust was created for the life of his son, the income during his minority to be added to the principal and the income of the whole fund to be thereafter paid to him. In an action by the son to have the trust declared void and the fund paid over to him, judgment was rendered declaring the trust valid. *Held*, That said judgment was a bar to an action by creditors of the son to recover the accumulations of income; that the estoppel was available to the son of the beneficiary although he was not *in esse* when it was rendered, and that the executor of M. could not waive the estoppel to the prejudice of the persons beneficially interested and claiming it.—*Pray et al. v. Hegeman et al.*, 224.
2. A former adjudication is none the less a bar to a subsequent action involving the same questions because the unsuccessful parties in the former action have joined another person with them as plaintiffs in the subsequent one.—*Meagley et al. v. The City of Binghamton*, 370.
3. A complaint in ejectment set up legal title and right of possession under certain deeds. The answer alleged that the premises were fraudulently included in a trust deed to plaintiff's grantor. Judgment was rendered awarding possession to plaintiff and damages for detention. *Held*, That such judgment simply vested a legal title in plaintiff derived from the trust deed, and left her as trustee in an existing trust, and was not a bar to an action to set aside the trust as void.—*Jackson v. Andrews et al.*, 505.

See CONVERSION, 5; DIVORCE, 5; ESTOPPEL LEASE, 4; LIMITATION; SURROGATES, 5.

#### BILL OF PARTICULARS.

1. Where defendant is not entitled to a bill of particulars as a matter of right, but on a demand by defendant plaintiffs serve one which is defective, an order that plaintiffs furnish a further bill of particu-

lars is in the discretion of the court, and will not be interfered with where it appears that such further bill will be a facility which plaintiff should afford to defendant in preparing a bill of particulars which defendant had been ordered to give.—*Langdon et al. v. Brown*, 239.

See LIBEL, 3.

#### BONA FIDE PURCHASER.

See MORTGAGE, 1.

#### BONDS.

1. The right of a *bona fide* holder for value of a negotiable bond issued by a railroad company to recover thereon is not affected by the fact that the railroad sold the bonds at a discount contrary to the provisions of their charter, which forbade the sale of them at less than their par value.—*Ellsworth v. The St. Louis A. & T. H. R.R. Co.*, 419.
2. A foreign corporation sold its bonds in the city of New York, the principal and interest being payable there. *Held*, That they were New York contracts and valid here although there were provisions in the charter of the company which would make them illegal in the State where the charter was granted.—*Id.*

See EXECUTION, 8; SURETYSHIP, 2, 3.

#### BREACH OF PROMISE.

See MARRIAGE, 3.

#### CANALS.

1. The grant to plaintiffs of a right to draw water from the canal for milling purposes under Chap. 270, Laws of 1822, and Chap. 100, Laws of 1827, was a limited estate liable to be defeated by the happening of the contingency provided as a condition subsequent. The contingency having occurred and the commissioners having duly exercised their right of revocation, plaintiffs had no claim for damages against the state.—*Dermott et al. v. The State*, 486.

See LIMITATION, 3, 4.

#### CHARTER PARTY.

1. When by a charter party provision is made for payment of the freight in a particular place and in a particular manner, and the debtor provides the requisite funds at the place named, if the creditor does not accept payment in the manner agreed upon he assumes whatever risk is attendant upon his omission to do so.—*Holdsworth v. De Belaunzaran et al.*, 127.

2. By the terms of a charter party a portion of the freight was to be paid at Cadiz in cash. Upon arriving there the master of the vessel, although knowing that the charterer's agent at that place had sufficient moneys of theirs in his hands with which to pay the freight, for convenience in remitting the same to the owners, allowed such agent to undertake to procure a draft for him and forward the same to them, and relied upon the statement of such agent that he had done so without investigation. Such agent did not procure a good draft, but drew an unauthorized draft on the charterers, having at that time no money of his in their hands, and such draft when presented was dishonored. *Held*, That an action could not be maintained against the charterers to recover the freight for which the draft was taken.—*Id.*

#### CHATTEL MORTGAGE.

1. A chattel mortgage given to indemnify a surety upon an undertaking in an act on against loss or damage, and conditioned that it should be void when the mortgagor should pay the damages, etc., that should be adjudged against him, and providing that the mortgagee, "if he should deem himself in danger of losing the said debt, by delaying the collection thereof until the expiration of the time limited for the payment thereof," might take possession, etc., authorizes the mortgagee in taking possession before any liability upon the undertaking has accrued.—*Filkins v. Cruice*, 292.
2. In the absence of any finding of fact tending to show that the mortgagee did not act in good faith in making the seizure, or that he did not in fact deem himself in danger of loss, a finding of the court that the seizure and detention was wrongful is unwarranted, and especially so when inconsistent with the facts found.—*Id.*
3. An understanding or arrangement between the parties to a chattel mortgage that the mortgagor shall be permitted to deal with the property for his own benefit renders the mortgage fraudulent and void as to creditors, whether such arrangement is contained in the mortgage or exists by parol, and whether such parol agreement is valid or not.—*Potts v. Hart et al.*, 496.
4. Declarations made by the mortgagee's bookkeeper at the time of taking the mortgage, to the effect that it would not affect the mortgagor in any way to give it, are competent as part of the *res gestæ*.—*Id.*

See REFLEVIN, 1.

CHECKS.

1. Defendant, on his marriage with plaintiff, placed a check drawn by him among the presents, nothing having been previously said about it. Thereafter plaintiff presented it for payment, which was refused. *Held*, That an action upon the check could not be maintained, as it was without consideration and did not constitute a valid gift.—*Cloyes v. Cloyes*, 347.

CHILDREN.

1. By Chap. 864, Laws 1864, defendant was authorized and empowered to "take, receive and hold under its care and control children of Roman Catholic parentage between seven and fourteen years of age who may be committed to its care as idle, truant, vicious, homeless or vagrant children," etc. *Held*, That this statute confers no right or power to detain children after they have arrived at the age of fourteen years.—*Fassett v. The Society for protection of destitute Roman Catholic children*, 513.
2. Upon a commitment as a homeless child no trial and conviction and the filing of a record thereof, as in cases of children charged with vagrancy or petit larceny, is required.—*Id.*
3. It being the duty of the magistrate to cause a notice of the commitment to be served upon the parent, it will be presumed that the officers performed their duty, especially as it appeared that plaintiff's step-mother caused his commitment, and his father shortly thereafter visited him.—*Id.*

See NEGLIGENCE, 20.

CIVIL DAMAGE ACT.

1. In an action brought by a wife under the Civil Damage Act the court admitted evidence to show a request from plaintiff to defendant not to sell liquors to her husband; a notice to defendant that the husband was in the habit of abusing plaintiff; that defendant had previously sold liquor to the husband, and that the liquor was sold without a license. *Held*, No error.—*Grady v. Prigge*, 61.
2. A parent of an adult child is not entitled to recover damages for injury to his means of support under the Civil Damage Law in absence of proof that he is a poor person unable by work to maintain himself, and that the child was, before and at the time of the injury, under a legal obligation to support him, and that by reason or in consequence of the child's intoxication his accustomed means of maintenance have been cut off or diminished.—*Stevens v. Cheney et al.*, 274.

3. Under the Civil Damage Act, Chap. 646, Laws of 1873, the complaint need not allege a sale or giving of liquor to the intoxicated person if it state the facts required by the statute.—*Ford v. Ames*, 411.

4. A complaint alleged that defendant sold or gave away intoxicating liquors at a certain place; that said liquors caused the intoxication of plaintiff's husband; that in consequence of such intoxication he was drowned; that by reason of such intoxication caused as aforesaid and of the death of her husband plaintiff, who was wholly dependent upon her husband, was injured, etc. On demurrer, *Held*, that the complaint was sufficient.—*Id.*

CODE CIVIL PROCEDURE.

See APPEAL, 14, 15; ATTACHMENT, 5, 14; ATTORNEYS, 10; BANKS, 11, 13; CONTEMPT, 1, 2; CONTRACT, 11; CONVERSION, 9; CORPORATIONS, 3, 4, 6, 14; COSTS, 6; CREDITOR'S ACTION, 7; DEPOSITIONS, 2; EJECTMENT, 1; EVIDENCE, 3; EXECUTION, 6, 7; EXECUTORS, 10, 15, 16; INJUNCTION, 1; MUNICIPAL CORPORATIONS, 6; PARTIES, 2, 3; PARTITION, 1; PLEADING, 6, 18, 19; RECEIVERS, 7; REFERENCE, 3; SCHOOLS, 2; SERVICE, 1; SURROGATES, 2, 3, 10; TRESPASS, 1; VENUE; WILLS, 12.

CODE CRIMINAL PROCEDURE.

See CONSTITUTIONAL LAW, 1; CRIMINAL LAW, 4, 6; MURDER, 3.

CODE OF PROCEDURE.

See APPEAL, 7.

COMMON CARRIERS.

1. Defendant sold separate tickets to plaintiff over its own and a connecting line in which it was not interested, but for which it sold tickets as agent. *Held*, That the separate tickets were insufficient evidence to justify the conclusion that defendant contracted to carry plaintiff beyond its line, and that it was not liable for injuries occurring on the connecting line.—*Poole v. The D., L. & W. R.R. Co.*, 114.
2. Plaintiff was injured by an accident while riding on one of defendant's trains on a free pass containing a stipulation exempting defendant from liability for such occurrences. He had also purchased a ticket on the drawing-room car on said train, paying therefor the sum of one dollar. *Held*, That, it not appearing what were the relations between the company alleged to have operated such drawing-room car and the railroad company, the car must be presumed to have been run for

defendant's benefit, and the acceptance of plaintiff as a passenger thereon for hire avoided the stipulation in the pass exempting defendant from liability.—*Ulrich v. The N. Y. C. & H. R. R.R. Co.*, 162.

8. Where a common carrier delivered goods to a consignee without payment of freight, and thereafter a dispute arose as to the amount to be paid, *Held*, in an action of replevin, that the question whether plaintiff had waived its lien was properly submitted to the jury.—*The Geneva, I. & S. R.R. Co. v. Sage*, 167.
4. When goods are delivered to the first of several connecting carriers under a bill of lading directing that the consignees be notified of the arrival of the goods but not directing the delivery of the goods to them, and the goods are transferred to the last of said carriers without notification to him of the provision in the original bill of lading directing notice only of the arrival of the goods to be given to the consignee, said carrier will not be guilty of a conversion of the goods by delivering them to the consignee.—*Furman v. The Union Pacific R.R. Co.*, 204.
5. A bill of lading, not accepted by the consignee or owner of the property, made out after the property has been shipped and not received until it is well on its way toward its port of destination, will not have the effect of merging or superseding a preceding contract for the carriage of the property made between the parties and under which it has previously been received by the carrier.—*Swift et al. v. The Pacific Mail S.S. Co. et al.*, 400.
6. In the absence of any restriction contained in its charter, a corporation engaged in the business of transporting property has power to make a contract for the carriage of property not only over its own route but also over others connecting with it to the place of destination of the property; and it follows from this fact that two corporations engaged in the above business whose routes connect can enter into a joint contract with the shipper of goods to carry the same over their continuous routes.—*Id.*

See LIMITATION, 2.

#### COMMON PLEAS.

See APPEAL, 13.

#### COMPROMISE.

1. A debtor has the right to make the best compromise with his creditor that he can, using no fraud or culpable artifice to accomplish that result. Each party to such a compromise has a right to the advantage his superior skill, foresight and knowledge may give him.—*Graham v. Meyer*, 424.

2. Before a compromise of a disputed claim can be annulled on the ground of fraud the creditor must restore the money paid him with interest, and restore to the debtor his right to appeal from the judgment, if any, previously recovered on said claim, if such right has been lost by lapse of time.—*Id.*

See ATTORNEYS, 7, 10, 11; FRAUD, 6.

#### CONSIDERATION.

See CONTRACT, 18; JUDGMENT, 3.

#### CONSTABLES.

See EXECUTION, 7, 8.

#### CONSTITUTIONAL LAW.

1. Sub. 8 of § 8 of the Code of Criminal Procedure, providing that the deposition of a witness taken before the magistrate, in the presence of the defendant, who at the time had an opportunity of cross-examining the witness, may, under certain circumstances, be read in evidence upon the trial, is not unconstitutional.—*The People v. Williams*, 69.
2. Chap. 522, Laws of 1884, entitled "An act laying out public places, parks, and parkways in the 23d and 24th Wards of the City of New York, and in the adjacent district in Westchester Co., and authorizing the taking of lands for the same," does not violate § 16 of Art. 3 of the Constitution of the State of New York because it provides that a portion of the parks so laid out shall be used as a parade ground for a division of the National guard.—*In re application of The Mayor &c. of N. Y.*, 102.
3. An avenue or parkway, from 400 to 600 feet in width and a mile or two in length, joining two parks, is not a road or highway within the meaning of § 18 of Art. 3 of the Constitution of the State of New York, and the legislature is not prohibited by said section from laying out, etc., the same by a local bill, and the power to do so is not abridged by the fact that an existing highway is included within such parkway.—*Id.*
4. The constitution has not required that lands taken for public parks shall be within the corporate limits of the city for the benefit of whose inhabitants they may be designed. All that can be required is that they shall be so contiguous to the municipal territory as to be conveniently accessible by its population for its use and enjoyment.—*Id.*
5. A direction, contained in an act of the legislature, to commissioners to be appointed thereunder for the purpose of appraising the value of lands to be taken for a public use, to make a just and equi-



table estimate of the loss and damage sustained by the owners in the taking of their property includes the taking of evidence concerning the value of the property, and the omission to provide in direct terms for the taking of such evidence does not render the act unconstitutional, even if the taking of such evidence were essential under the constitution. Such commissioners are not required by the constitution to take evidence concerning the value of the property intended to be appropriated. They may act upon the knowledge or information acquired by their own personal examination and investigation.—*Id.*

6. An act providing for the taking of land for public purposes which provides an opportunity for the owners of such land to appear and be heard before the commissioners appointed to appraise it does not violate the provision of the constitution prohibiting any person from being deprived of property without due process of law, and if such opportunity be provided the legislature has power to determine the form and time and manner of notice to be given, and personal notice is not necessary.—*Id.*
7. The right, provided by such an act, of presenting objections to the appraisalment of the commissioners, both to the commissioners themselves and to the Court upon the application for the confirmation of their report, upon which any matter which may be alleged against the report is to be considered, includes the right to support such objections by the presentation of affidavits.—*Id.*
8. When an act of this character has provided that the three commissioners of appraisalment shall act together in performing their duties, a provision authorizing a majority of them, in case of a disagreement, to fix the value of the property to be taken does not render said act unconstitutional as violating § 7 of Art. 1 of the constitution.—*Id.*
9. An act providing that leases and other contracts in regard to lands taken for public purposes shall cease and be determined upon such taking does not violate the provision of the Constitution of the United States prohibiting the States from passing any law impairing the obligation of a contract.—*Id.*
10. When an act taking land for public parks imposes upon the city for the benefit of whose inhabitants it is taken the obligation of making compensation for the same, and in default thereof gives a right of action against said city, this is all that is necessary by way of providing for compensation to the owner whose property may be taken.—*Id.*
11. Chap. 272, Laws of 1884, prohibiting the

manufacture of cigars in certain classes of tenement houses in certain cities, is unconstitutional. *In re application of Jacobs*, 141.

12. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.—*Id.*
13. A declaration in the title or in the body of an act that it is intended for the improvement of the public health does not conclude the courts.—*Id.*

See CORPORATIONS, 7, 8; TAXES, 8.

## CONSTRUCTION OF STATUTES.

See STATUTES.

## CONTEMPT.

1. The proceeding by attachment, under the Revised Statutes, to enforce a Surrogate's decree, has been suspended by § 2555 of the Code. Under this section a Surrogate may by order punish for contempt a refusal or wilful neglect to obey his decree.—*In re Snyder*, 19.
2. This section applies to the case of an executor whose trust was created, and whose wrongful acts in the trust were done, before this statute went into operation, but who was called to account thereafter.—*Id.*
3. A witness convicted of contempt of court for the contumacious and unlawful refusal to answer certain legal and proper interrogatories propounded to her as a witness on a certain day cannot be committed to the county jail "until she shall purge herself of the contempt aforesaid, and make answer to such legal and proper interrogatories which may be propounded to her as a witness," but only until she shall make answer to the interrogatories which were propounded to her on the previous day.—*The People ex rel. Jones v. Davidson*, 324.

## CONTRACT.

1. In March H. entered into a written contract with M. & L., to cut the timber on certain lands, turn it into coal and deliver it at a certain railroad to cars to be furnished by M. & L. In April L. sold out his interest to another. In May M. said to H. that they would not carry out the contract and would take the consequences. In an action by the assignee of H. upon the ground that H. had been prevented from performing, *Held*, that as no tender was shown there could be no recovery; that L. was not bound by the statements of M. made after L. had sold

- out his interest in the contract.—*Holcombe v. Munson et al.*, 48.
2. A verbal addition to a written contract which fixed the amount of goods to be delivered thereunder, said amount being over fifty dollars in value, no part thereof having been delivered and nothing having been paid thereon, is void and there can be no recovery upon the verbal agreement.—*Id.*
  3. Two brothers, A. and B., owned real and personal property as tenants in common. They agreed by oral promise that each should by will leave to the other all his property, and they accordingly executed their wills and left them with their attorney. Afterward B. destroyed his will and died intestate. *Held*, That A. cannot sustain an action against B.'s heirs for specific performance of the parol agreement.—*Gooding v. Brown et al.*, 106.
  4. A contract for the sale of land provided that the vendee should pay all taxes and assessments to be laid or assessed on the premises during the time he was in possession under the contract. He took possession in September. Thereafter, in December, the Supervisors levied the tax and issued their warrant for its collection. The vendee neglected to pay, allowed the premises to be sold for non-payment, and after the purchaser received his deed arranged with him for a surrender of a portion. *Held*, That the tax was laid after the vendee took possession, and that specific performance of the contract should be decreed.—*Van Bramer v. Shaffer*, 139.
  5. Plaintiff agreed with defendant to sprinkle a portion of a street. Such contract was within the powers of defendant and all the proceedings to effect it were regular on their face, and plaintiff in good faith did the work. The proceedings were in fact irregular, in that the initiatory petition was not signed by a majority of the persons taxable for the service. *Held*, That plaintiff was entitled to recover for his services.—*Schier v. The City of Buffalo*, 241.
  6. Where the market value of merchandise at the place of delivery is controlled by its market value at a neighboring place, evidence of its value at the latter place is competent in an action upon breach of contract to deliver such merchandise.—*Wilsey v. Yourden*, 278.
  7. Where the writings executed by the respective parties read together contain a definite agreement of bargain and sale, and lack no element of an entire contract, evidence of an oral warranty by the seller is not admissible.—*Eighmie v. Taylor*, 306.
  8. Defendant having, as agent, purchased certain real estate for one D., desired to take an interest in the purchase. D. proposed that he should take the chances of profit or loss and go in even. Defendant agreed to this and D. completed the purchase, paying his own money and taking title in his own name. *Held*, That the contract was valid within the statute as being in the nature of a partnership agreement.—*Babcock v. Read*, 316.
  9. It is no longer the rule that an agreement in restraint of trade cannot transcend the boundaries of the state in which it may be made.—*The Diamond Match Co. v. Roeber*, 353.
  10. The reason upon which the principle has been maintained by which a person was permitted to bind himself not to engage in a competing business within a prescribed locality authorizes and sanctions its extension in an equal degree, and renders it applicable to the enlarged bounds prescribed for modern business transactions, and accordingly only such restraints upon trade are invalid as violating public policy as are unnatural and unreasonable, and not required by the parties for their protection in the ordinary and legitimate course of their dealings.—*Id.*
  11. An extra allowance cannot be granted under § 3253 of the Code of Civ. Pro in an action to restrain defendant from carrying on a certain business in violation of a contract not to do so entered into by him with plaintiff.—*Id.*
  12. It is not necessary under the Statute of Frauds that the whole agreement should be contained in one writing; but where the letters of the respective parties are all connected and relate to each other they may be read together and collectively furnish the written evidence of the agreement.—*Peck v. Vandemark*, 408.
  13. The surrender by a soldier's widow of her pension on her re-marriage and the marriage itself will furnish ample consideration for an antenuptial promise by the second husband to provide for her by will.—*Id.*
  14. Defendant took a conveyance of personal property and of a hotel business, and in consideration thereof agreed to pay the debts of the grantors and assignors as soon as he was able to do so. In an action by a creditor of the grantors upon this clause plaintiff gave no evidence of defendant's ability to pay. It appeared, however, that defendant had conducted the hotel business at a profit, had paid upon mortgages which were on the personal property when he bought; had paid other creditors of the grantors and that there was an equity in the mortgaged personal property. *Held*, That the

plaintiffs were properly nonsuited.—*Somers et al. v. Brigham*, 438.

15. Plaintiff made a written contract with specifications to build for defendant a house. Upon the trial evidence was admitted that the materials furnished were as good as were ordinarily used in much more expensive houses; also that they were of the same quality and grades as lumber the prices of which plaintiff's husband, acting as her agent, had inquired the prices of shortly before. *Held*, That upon the question of substantial performance the evidence was competent.—*Slade v. Cherry*, 434.

16. One who, as a member of a firm, has contracted with another for the performance of a certain thing may as an individual make a valid promise concerning the same matter.—*Pond v. Starkweather*, 446.

17. In an action upon a promise to pay for goods it appeared that on a negotiation of a sale of the goods to defendant's firm one of his partners objected to some of the terms of the offer, whereupon defendant agreed orally that if the vendor would comply with his partner's wishes defendant would pay according to the objectionable terms. *Held*, That this was not a promise by the firm, but was a distinct contract binding on the promisor.—*Id.*

18. When relations exist between two persons founded upon ties of blood, love and affection, to which are added those of confidence in fiduciary matters, and a contract is made or any other proceeding adopted by which one disposes to the other of all his property, the law regards the transaction with great jealousy and requires that it shall be established by testimony so reasonably certain as to establish beyond reasonable doubt, not only the fairness and validity of the transaction on its merits, but that it was not the result of undue influence exerted through the elements above stated.—*Tucker v. Dean*, 519.

19. A land contract provided that if the vendee should fail to perform any part of the contract the vendor should have the right to declare it void and retain the payments made, besides all the improvements, and to take immediate possession of the premises, &c. The vendee, after making various payments, left the premises, and the vendor took immediate possession and used the farm as his own, &c. *Held*, That the vendor thereby elected to treat the contract as rescinded, and could not recover for its breach.—*Moody v. Gerharts*, 524.

See AGENCY; COMMON CARRIERS, 6; DEEDS, 6, 7; FIRE INSURANCE, 1; FRAUD, 1; RAILROADS, 14; SPECIFIC PERFORMANCE, 1, 2; STOCKS, 4.

## CONVERSION.

1. Plaintiff's horse was stolen. Defendant about the same time purchased a horse from one W. There being evidence enough to submit the question of the identity of the horse to the jury, they found that defendant had purchased plaintiff's horse. *Held*, That defendant was guilty of a conversion even if the purchase was innocently made by him.—*Bates v. Riordan*, 134.

2. Defendant was bound to deliver certain shares of stock, and upon demand duly made, on the day fixed therefor, refused to make delivery. Thereafter he tendered the stock, which had decreased in value, to plaintiff, who accepted it. On the trial, plaintiff's offer to prove such decrease as the measure of damages was refused, and the jury was instructed that the measure of damage was the interest on the value of the shares from the day of the wrongful refusal to deliver to the day of actual delivery. *Held*, Error. The measure of damage, if the case be considered a breach of contract, was the difference between the value at the time of refusal and the value at the time of delivery, to be computed by the jury. If it be considered as conversion, it was merely a constructive conversion, and defendant after his refusal could, as he did, deliver the shares, which goes in mitigation of damages.—*Boomer v. Flagler*, 152.

3. One of the patrons of a cheese factory may maintain an action against the salesman or agent of the patrons to recover his share of the proceeds of a check which the salesman had received, but failed to present within a reasonable time, whereby the check became worthless, the maker having become insolvent.—*Soule v. Mogg*, 186.

4. In an action for conversion where defendant seeks to justify under an attachment against the property of the person from whom plaintiff purchased the chattels in question, and plaintiff gives evidence of the sale and a valuable consideration paid by her before the levy, and also gives some explanation why there was not a visible change of possession, the case should be left to the jury, and the burden is on defendant to show the fraudulent nature of the transfer, in case the jury find a purchase for valuable consideration.—*Hough v. Boue et al.*, 190.

5. That plaintiff paid the attaching creditor's claim to the sheriff does not bar the action, the payment being compulsory and under protest, and to enable plaintiff to recover possession of the property.—*Id.*

6. Such return and acceptance is not a sat-

isfaction, but may be considered in mitigation of damages, the amount paid by plaintiff constituting special damages.—*Id.*

7. When a debtor, in payment of his debt, delivers goods to a railroad company consigned to his creditor and forwards the bill of lading with an invoice or bill of sale of the goods to his creditor the title to the goods is thereby transferred to the creditor subject only to his refusal to accept the consignment when the facts come to his knowledge; and, after such acceptance, the title vests absolutely in the creditor. When a sheriff is sued for conversion of goods which he took from plaintiff under an attachment against the property of another person, title out of the plaintiff and in another person than the one against whose property the attachment was issued cannot be relied upon or proved by way of defense to the action.—*Brown et al. v. Boue*, 323.
8. In an action for conversion the complaint alleged title and the right to possession. The answer was a general denial and title in K. Bros., but without connecting defendants in any way with such third persons. *Held*, That, under these pleadings, evidence could not be given by defendant to show that he was a creditor of K. Bros., who had attached the property in question and sold it under a judgment in that action; also that defendant could not show that a judgment against K. Bros. under which plaintiff claimed title was fraudulent, and the proceedings, therefore, irregular.—*Klinger v. Bondy et al.*, 488.
9. When two plaintiffs bring an action as co-partners to recover damages for the conversion of certain goods the defendant is not entitled to a verdict merely because it appears that the plaintiffs are not co-partners. Even if there is no partnership, if one of the plaintiffs was the legal *bona fide* owner of the property at the time of its conversion, he is entitled to a verdict in his favor for its value under § 1204, Code of Civ. Proc.—*Hine et al. v. Boue*, 558.

See APPEAL, 22; ATTACHMENT, 14; COMMON CARRIERS, 4; CRIMINAL LAW, 5; ESTOPPEL, 2; PLEADING, 7, 9; RAILROADS, 16.

#### CORPORATIONS.

1. A corporation is liable for malicious prosecution.—*Morton v. The Metropolitan Life Ins. Co.*, 54.
2. Where the superintendent of the corporation had prosecuted the action on which this suit was based, evidence that the counsel's bill in that action was paid by the corporation is relevant.—*Id.*
3. The provision of the Code regarding a service upon an agent, stating that such an one must be "managing agent," does not mean that he must have charge of the whole business of the corporation.—*Palmer v. The Pennsylvania Co.*, 130.
4. The statute is satisfied if such an one be a managing agent to any extent.—*Id.*
5. Every object of the service is attained when the agent is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.—*Id.*
6. A non-resident of the State of New York, even though he be a citizen thereof, cannot maintain an action in the courts of that State against a foreign corporation except in one of the cases specified in § 1780 of the Code of Civ. Pro.—*Adams v. The Penn Bank of Pittsburgh*, 154.
7. The provisions of the Constitution of the U. S. securing to the citizens of each State all the privileges and immunities of citizens in the several States entitle the citizen of one State to claim in another State only such privileges and immunities as pertain to citizens of the latter State by reason of their citizenship, and not such privileges, etc., as he would be entitled to in his own State.—*Id.*
8. A corporation is not a citizen of the state in which it has its place of business, or of any other state, within the meaning of the provision of the Constitution of the U. S. securing to the citizen of each state all the privileges and immunities of the citizens of the several states.—*The Duquesne Club v. The Penn Bank of Pittsburgh*, 182.
9. When stock of a corporation has been issued to a stockholder paid up to a certain amount when such amount has not in fact been paid, and bonds of the corporation have been issued to him without consideration, a judgment creditor of the corporation can maintain an action against such stockholder to recover the amount so unpaid on the stock and the market value of the bonds at the time they were so delivered.—*Christensen v. Eno*, 202.
10. In such an action the plaintiff's judgment is probably competent *prima facie* evidence against defendant of the existence of the indebtedness for which it purports to have been recovered.—*Id.*
11. Such an action is not one to reach or enforce an indebtedness or obligation existing in favor of the corporation, but is equitable in its nature, and is not barred until ten years after the time when it accrued.—*Id.*

12. The fact that the indebtedness of the corporation to plaintiff did not exist at the time of the delivery of the stock and bonds to defendant is no defense to the action.—*Id.*
13. Bonds of a corporation which have a saleable value for the whole or some part of their par value, and may therefore be turned into money in the treasury of the company, are for all practical purposes assets to the extent of their productive power.—*Id.*
14. A claim against a foreign corporation by a non-resident can be assigned to a resident of this State for the purpose of enabling him to sue and thus to avoid the disability which would otherwise exist against a non-resident under § 1780 of the Code of Civil Procedure.—*Erwin v. The Oregon R. & Nav. Co.*, 206.
15. The trustees of a manufacturing corporation are not rendered personally liable for the debts of such corporation, either under § 2 of chap. 333 of the Laws of 1853, or § 15 of the act of 1848 providing for the incorporation of such companies, by the mere omission to specify separately in their annual report the amount of stock issued for cash and the amount issued for property purchased by the company. It is not necessary to make such separate statement to comply with § 12 of the said act of 1848.—*Whitaker v. Masterton et al.*, 209.
16. In order to render the trustees of a manufacturing corporation personally liable for the payment of its debts under § 15 of the act of 1848, *supra*, upon the ground that they have made a false report, it must appear that they have signed the report knowing it to have contained a materially false representation, and that it was made in bad faith or for some fraudulent purpose.—*Id.*
17. All persons dealing with the president of a corporation in the name of the corporation are bound to take notice of the nature and extent of his authority when he assumes to act as such president in making any contract; and the by-laws of the corporation are competent evidence for the purpose of showing the extent of his authority without proof of notice of such by-laws to the other party.—*De Bost v. The Albert Palmer Co.*, 228.
18. When a certificate of a certain number of shares of the stock of a corporation has been issued to a stockholder thereof as a stock dividend, when in fact no such dividend has been earned, and the board of directors subsequently rescind their resolution declaring such stock dividend, such rescission annuls the previous action of the board and cancels the certificates which have been issued, and the stockholders cannot be held to any liability, as such, upon or by virtue of the alleged shares so issued to them and afterward annulled, for any claim against the corporation accruing after such rescission.—*Hollingshead v. Woodward*, 229.
19. A judgment sequestrating the property of a corporation and appointing a receiver thereof and enjoining the corporation from the exercise of its corporate franchises does not operate to dissolve the corporation, and the stockholders are not relieved from their personal liability, as such, at the end of two years from the taking effect of such judgment upon the ground that they have ceased to be stockholders for that length of time. A corporation cannot be dissolved except by the judgment of a court of competent jurisdiction dissolving it.—*Id.*
20. Sec. 15 of Ch. 611, Laws of 1875, prescribing the mode in which the stock of certain business corporations shall be reduced, has been repealed, by implication, by Ch. 264, Laws of 1878.—*The People ex rel. The Eden Musee Co. v. Carr*, 257.
21. A judgment against a business corporation founded upon advances made to it by one of its directors cannot be included in estimating the indebtedness of such corporation for the purpose of sustaining an action to enforce the liability of the trustees of such corporation, imposed by § 22 of Ch. 611 of the Laws of 1875, for creating an indebtedness in excess of the capital stock in the corporation.—*McClave et al. v. Thompson et al.*, 452.
22. Bonds of the corporation not shown in the complaint to have been issued or to have reached the hands of creditors cannot be included in estimating such indebtedness.—*Id.*
23. All the directors of the corporation liable under § 22 of Chap. 611 of the Laws of 1875, *supra*, must be joined in an action to enforce the liability so imposed.—*Id.*
24. Where, under § 23, Ch. 40, Laws of 1848, relative to manufacturing corporations, it is sought to hold a trustee upon the ground that he has assented to an increase of the indebtedness of the company in excess of the amount of the capital stock, it is not enough to show that he signed the annual reports. If it appear that he did not attend the meetings of the trustees, took no share in the conduct of the corporation and signed the reports upon the statement of another trustee that they were correct and without any knowledge of the truth of the facts he will not be deemed to have assented to an increase of indebtedness. A failure to dissent is not equivalent to an assent to the creation of the

debt within this section.—*Patterson v. Robinson et al.*, 475.

25. Where the indebtedness of a corporation is already beyond the amount of its capital the liability of the trustee to those who subsequently become its creditors attaches at the instant the debt is created, and that liability cannot be divested except by the consent of the particular creditor.—*Id.*

26. Payment to other creditors, by which the aggregate indebtedness of the corporation during the trustee's term is reduced, will not relieve him from liability to that creditor to the creation of whose debt the trustee did assent.—*Id.*

27. A corporation organized for the purposes of "collecting, storing and preserving ice, of preparing it for sale, of transporting it to the City of New York, or elsewhere, and of vending the same," is not a manufacturing corporation within the meaning of Chap. 542, Laws of 1890, as amended by Chap. 361, Laws of 1881.—*The People v. The Knickerbocker Ice Co.*, 488.

28. Where the existence of a corporation is attacked it is the duty of its officers to offer resistance if the facts justify it, and the court should compensate counsel who have in good faith acted for the corporation sought to be dissolved, after a receiver had been appointed.—*The People v. The Atlantic Mutual Life Ins. Co.*, 559.

29. Where the affairs of a corporation are in such condition that the object for which it was formed is destroyed and there is neither an ability or intention at any time to further prosecute its business it ceases to be a company carrying on business within the meaning of the statute and the direction as to filing an annual report does not apply.—*Kirkland v. Kille*, 571.

See APPEAL, 4; ASSOCIATIONS, 2; ATTACHMENT, 3, 4; RECEIVERS, 1-4.

#### COSTS.

1. Until the contrary is shown, it will be presumed that an order of Special Term allowing additional costs was rightfully granted. Although the record and papers before the appellate court do not show that the case was difficult and extraordinary the case is not necessarily excluded from the operation of the statute giving additional allowance.—*Gooding v. Brown et al.*, 46.

2. In an action in the Superior Court of New York City plaintiff need not give security for costs as a non-resident if he reside within the State.—*Ralph v. Husson*, 240.

3. The mere fact that the note in suit was transferred to plaintiff by the administrators of an insolvent estate furnishes no ground for demanding from him security for costs.—*Id.*

4. A motion for an additional allowance cannot be granted after the adjustment of the costs of the action, and the effect of such adjustment is not changed in any manner by the fact that other costs awarded on an application to open a default are still to be adjusted.—*Jones v. Wakefield*, 287.

5. Where a plaintiff appealed to the County Court from a judgment of justice's court against him for costs and on the new trial recovered a judgment for \$3, *Held*, That he was entitled to costs of appeal.—*Goodenough v. Billings*, 405.

6. The water commissioners of a village made a contract with defendants for certain machinery to be paid for by the village on their acceptance of it, the title to remain in defendant until full payment. This has not been made. Plaintiffs, as taxpayers, by this action sought to restrain the performance of the contract as *ultra vires*, but were defeated. *Held*, That a pecuniary right was directly involved in the action, the value of which was the basis for an extra allowance under § 1353 of the Code.—*Mingay et al. v. The Holly Mfg. Co.*, 454.

7. One taking an assignment of a claim after judgment rendered against its validity and prosecuting an unsuccessful appeal is liable for all the costs of the action and the appeal.—*Olmsted v. Keyes et al.*, 522.

See CONTRACT, 11; SCHOOLS, 2; SERVICES, 5; SURREGATES, 10; TRESPASS, 1-8.

#### COUNTERCLAIM.

See GUARDIAN, 3; LEASE, 4; PLEADING, 18, 19.

#### COUNTY COURT.

See APPEAL, 11; COSTS, 5.

#### COUNTY TREASURER.

1. On a sale on partition a mortgage was taken by the referee and assigned to O. as county treasurer. In an action for misappropriation of the proceeds by O. it appeared that he held two prior mortgages on the property, and both he and the attorney for the plaintiff in the partition suit testified that the mortgage was assigned to him to pay said mortgages and on an agreement to repay the balance to the referee. The referee testified that nothing besides the mortgage was paid to

O. It also appeared that O. did not know that any of the parties to the partition suit were minors. *Held*, That a finding that the mortgage was assigned to O. on account of the shares of the infant defendants was not justified by the evidence, and that the report of distribution of the referee was not competent evidence against O. of the facts stated therein.—*Mills et al. v. Odell et al.*, 61.

#### COVENANTS.

See DEEDS, 5, 8; LEASE, 4, 15; PARTY WALL; PLEADING, 17; RAILROADS, 14.

#### CREDITOR'S ACTION.

1. A creditor's action, whether instituted under the provision of the Rev. Stats. or the Code Civ. Pro., can reach only property belonging to or things in action due to the judgment debtor or held in trust for him.—*Niver v. Crane et al.*, 42.
2. To make out a trust under 1 R. S., 728, § 52, the money must be paid at or before the execution of the conveyance.—*Id.*
3. In an action to reach land held by a judgment debtor's wife on the ground that it had been bought and paid for by him and that the transfer to her was made for the purpose of defrauding creditors, it appeared that the wife paid for it by transferring certain property of her own, assuming a mortgage thereon and giving her note for the balance. *Held*, That the debtor had neither title to nor any legal interest in such property.—*Id.*
4. A debtor, during the pendency of an action to recover the debt, is at liberty to convey property in payment of another indebtedness which he deems to be entitled to preferential consideration over that included in the action, and when that is the motive inducing such a conveyance it is not fraudulent as against the suing creditor, even though it was made on account of the bringing of his action.—*Goetting v. Biehler et al.*, 100.
5. By the commencement of a creditor's action to set aside a general assignment the judgment creditors in whose immediate favor it is prosecuted acquire a lien on the debts, demands and other choses in action of the assignor as equitable assets out of which they are entitled to be paid prior to other judgment creditors who have taken no proceedings to avoid the assignment or to reach such assets; but judgments are liens upon the assignor's real property in the order of their docketing, and the commencement of an action to set aside such assignment by one judgment creditor cannot deprive a prior judgment creditor of the lien of his judgment upon the real estate of the debtor

when that judgment was recovered and docketed before the commencement of the creditor's action and he was in no form a party to it.—*Clafin et al. v. Smith et al.*, 212.

6. When a judgment has been recovered setting aside a general assignment in an action brought for that purpose by a judgment creditor, other judgment creditors are entitled to be brought in under such judgment to share, according to their rights, in the distribution of the debtor's estate to be made thereunder.—*Id.*
7. A judgment creditor may maintain an action under §§ 1871, 1873, Code Civ. Pro., to establish the interest of the debtor in real estate for which he had paid, but the title to which was in his wife, and to charge such interest with the payment of plaintiff's claim, notwithstanding more than ten years have expired since the recovery of the judgment.—*Scoville v. Shed et al.*, 380.

See BAR, 1.

#### CRIMINAL LAW.

1. In a criminal action where the evidence of an accomplice has been received, the defendant is entitled to a charge that a conviction cannot be had on the evidence of the accomplice alone and that no conviction could be had on such evidence unless corroborated by such other evidence as tends to connect defendant with the crime, and a refusal to so charge is error calling for a new trial.—*The People v. Thompson*, 345.
2. The designation by the County Judge of the terms at which Courts of Sessions shall be held is an order of that officer in pursuance of the statute and a notice to the county clerk to draw grand jurors.—*The People v. Rugg*, 374.
3. The provisions of the Code do not compel the pleader to confine the indictment to a single statement of the facts where the proof is uncertain, but it is competent to allege in different counts such facts as may by possibility be presented on the trial.—*Id.*
4. Section 10 of the Penal Code is to be interpreted in connection with §§ 436, 437, of the Code Crim. Pro.—*Id.*
5. Defendant was convicted on an indictment charging him with feloniously obtaining from B., city treasurer, funds of the city and converting them to his use. There was no count charging him as accessory. The evidence showed that B. deposited the funds in a banking house of which he and defendant were members and they were used in their business; that defendant was away at the time, and that

an understanding existed between them that the city funds were so to be used. *Held*, That defendant was at most an accessory before the fact and could not be convicted under an indictment charging him as a principal.—*The People v. Lyon*, 460.

6. Sections 275, 276, Code Crim. Pro., do not deprive the People of the right to state the acts constituting the supposed crime in different counts in language appropriate to meet such circumstances and features of the event as may be developed on the trial, especially where there was no eyewitness of the event and the facts must be proved by circumstantial evidence.—*The People v. Menken*, 552.

7. The fact that the Lieutenant-Governor, who is now acting governor, and to whom application for pardon must be made, assisted the District Attorney on the trial is not a ground for a motion in arrest of judgment.—*Id.*

See ABANDONMENT; APPEAL, 17, 19; EVIDENCE, 18, 14; FORGERY; JURORS; LOTTERY; MURDER.

#### CURTESY.

1. The married women's acts of 1848, *et seq.*, have not abolished tenancy by the curtesy.—*Mack v. Roch*, 488.
2. Summary proceedings to dispossess a tenant may be brought by the husband as tenant by the curtesy of premises let by his deceased wife.—*Id.*

#### DAMAGES.

See CONVERSION, 2, 6; EJECTMENT; HUSBAND AND WIFE, 1, 2; INJUNCTION, 1; NEGLIGENCE, 19; RAILROADS, 10, 28.

#### DEEDS.

1. When a general description in a deed is inconsistent with a particular description, the particular description prevails.—*Case v. Dexter et al.*, 32.
2. When an uncertainty arises, not from the terms used, but as to the subject to which they are applied, oral evidence is admissible to identify the subject.—*Id.*
3. A reservation by parol of a life estate to the grantor in case of a deed in fee cannot be sustained.—*Hutchins v. Hutchins*, 44.
4. *Semble*, That a deed cannot be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention that the grantee should acquire no rights whatever under it, or that he should re-convey to the grantor on request without any consideration.—*Id.*

5. A release by a grantee of all rights of action under the covenants of his grantor's deed does not affect the title acquired by the grantee under the deed.—*Dawley v. Rugg et al.*, 52.

6. The courts will not aid a party to set aside an executed agreement on the ground of illegal consideration. As to all such contracts the courts will not compel either party to execute, or set aside the agreement when executed.—*Nearpass v. Neuman et al.*, 86.

7. A husband agreed to quit-claim certain property to a trustee and also to execute certain conveyances of other property to him, such deeds to be placed in escrow with said trustee and to be delivered when the wife should perform certain covenants to the effect that she would not oppose proceedings for a divorce. If the wife failed in her covenant, there was to be a return. The deeds were executed, acknowledged, recorded and by admission on trial duly delivered to said trustee. *Held*, That, assuming that the consideration was illegal, if the deed was delivered under the agreement neither the husband nor those in his shoes could assail the same; that the admission must be taken as acknowledging a delivery pursuant to and in conformity with the terms of agreement; that the recording thereof was inconsistent with the theory of escrow or of its return, and that these facts coupled with the production of the deed by the trustee are sufficient to prove execution and delivery under the contract in the absence of any evidence to the contrary as to whether the agreement was carried out.—*Id.*

8. The opening of a public street or highway to its legal width, or using it as a street, is not a sufficient eviction to enable the owner to maintain an action against his grantor for breach of a covenant of warranty.—*Hymes v. Esty et al.*, 273.

9. Where a deed is handed to a party to be delivered to the grantee at a future time, whether it is to be considered as the deed of the grantor presently, or as an escrow, depends upon the intention of the parties, to be gathered from the words used and the purposes expressed. If the future delivery is to depend upon the performance of some condition, it will be deemed an escrow; but if it is merely to wait the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently.—*Crain v. Wright*, 299.

10. So held where a deed to plaintiff was delivered to her husband, to be kept secret during the grantor's life, and after her death to be delivered to plaintiff.—*Id.*
11. The grantor intended to convey to the



centre of the street, but by mistake described the land by the exterior line only. The grantee subsequently mortgaged the entire premises and thereafter the grantor quit-claimed that portion lying within the street. *Held*, That the intention of the grantor was thereby carried out and that an objection by a purchaser at the foreclosure sale that the mortgagor had no title to the land within the street at the time the mortgage was given was without force.—*Smyth v. Rowe et al.*, 368.

12. A deed of premises was made to a mother "in trust for" her infant children, "with power to sell or mortgage without the appointment of a guardian." She mortgaged it for her own benefit. On foreclosure of a prior mortgage, *Held*, That the title was vested in the infants; that the mother had no beneficial interest, and that the infants were entitled to the surplus.—*The Syracuse Sav'gs B'k v. Porter et al.*, 510.

13. Plaintiff was the owner of two lots in the City of N. Y. known as numbers 141 and 143 West 49th street, each twenty-two feet in breadth and one hundred feet four inches in depth. A small structure was built upon the rear of lot No. 141, which did not cover the whole breadth of the lot. Subsequently a structure was built upon the rear of lot No. 143, which covered the whole breadth of that lot and extended 5 feet 8 inches over the line of lot 141 and up to the west wall of the structure upon the latter lot, which formed the easterly wall of that upon lot 143. The walls of the building on lot No. 143 were not keyed to the walls of that upon lot No. 141, and its beams rested upon piers. Plaintiff conveyed lot No. 143 by deed, describing it as 22 feet front and rear by 100 feet 4 in. in depth, with the buildings and improvements thereon together with the appurtenances. *Held*, That the grantee derived no right under this deed to occupy the 5 ft. 8 in. of lot 141 over which the structure upon lot 143 extended.—*Griffiths v. Morrison et al.*, 567.

See EASEMENT; HUSBAND AND WIFE, 8; LIMITATION, 1; MORTGAGE, 10, 13; TRUSTS, 2; WILLS, 16.

#### DEFENSE.

See BANKS, 2; CONVERSION, 7; CORPORATIONS, 12; GUARDIAN, 1; LEASE, 7, 18, 19; REPLEVIN, 8; USURY, 1.

#### DEPOSITIONS.

1. In an action brought by the receiver of the property of an insolvent firm to enforce his claims as receiver to an equitable lien upon the assets in the hands of the assignee of an individual member of

said firm for the benefit of his creditors for moneys wrongfully withdrawn from the firm by said individual member while said firm was insolvent, and to reach the proceeds of such moneys, so far as the same can be traced, into the hands of said assignee, such member of the firm who is a defendant in the action can be examined before trial for the purpose of ascertaining what particular pieces of property in the hands of his assignee were purchased with the funds so withdrawn from the firm, in order to enable the plaintiff to prepare his complaint; and an order providing for such examination does not offend against the rule prohibiting a defendant from being examined in such a proceeding as to any matters which might criminate him.—*Davies v. Fish*, 246.

2. The County Judge of the county in which the venue of an action in the Supreme Court is laid may order the defendants residing in such county to be examined under § 870 before him.—*Burt v. The Oneida Community et al.*, 342.

3. When an action is brought in good faith to enforce rights to property in which all the parties are interested, and the defendants retain the custody of all the contracts, etc., relating thereto, and plaintiff is without sufficient information to frame his complaint, an examination is proper.—*Id.*

4. This court will not review the exercise of the discretion of the Judge as to limiting the examination in the order where the examination is to be taken before him and not before a referee.—*Id.*

#### DISTRICT COURT.

See PRACTICE, 32.

#### DIVORCE.

1. Plaintiff commenced an action against her husband for separation on the ground of cruelty. Before issue was joined an agreement was entered into between them whereby plaintiff returned to her marital relations with defendant, and defendant agreed to pay costs and counsel fee in the action. Subsequently defendant served an answer. The action was never formally discontinued. *Held*, That the court had jurisdiction to enter an order in the action compelling defendant to pay plaintiff's costs and counsel fee.—*Smith v. Smith*, 163.

2. It is improper after the death of a plaintiff in an action for divorce for the attorney to take further steps in the action in the name of the deceased plaintiff. The action dies at the death of such party.—*Hopkins v. Hopkins*, 174.

3. An order of reference in a divorce suit "to hear, try and report to this court with his opinion," entered upon a stipulation of the parties made after issue joined to refer the cause for "hearing, trial and determination," is to be construed as an order for the trial and determination of the issues, and it is the only proper order that could be made by the court.—*Goodrich v. Goodrich*, 264.

4. The court, at Special Term, has no power to review the findings of the referee on questions of fact and to find the facts contrary to the findings of the referee; but if it appears that the proceedings have been regular, free from fraud or collusion, and that the evidence is sufficient to uphold the findings of fact, it is the duty of the court to enter judgment upon the report.—*Id.*

5. When an action of divorce is commenced in another State by a husband or wife resident therein against the other party at the time residing in this State, service of the process of the foreign court in this State upon the defendant will not confer jurisdiction over the latter's person nor authorize a judgment dissolving the marriage which will be effectual or operative beyond the State in whose tribunals it may have been obtained, and the foreign court cannot acquire such jurisdiction by the appearance of the defendant for the purpose of objecting and alleging the want of it, and, if such a plea or answer be overruled, he may still contest the merits of the action without depriving himself of the validity of the objection taken to the jurisdiction of the tribunal in proceedings brought for the direct purpose of reviewing and correcting the adverse decision; but, when a husband appears for the above purpose in an action for a divorce brought against him by his wife, and judgment is entered therein affirming the jurisdiction of the court and dissolving the marriage, such judgment will be a bar to an action for divorce brought by him against his wife in this State, and it cannot be impeached for want of jurisdiction collaterally in the latter action even though it may be considered erroneous by the courts of this State.—*Jones v. Jones*, 885.

See ALIMONY; MARRIAGE, 2.

#### DOWER.

1. To constitute an assignment or admeasurement of dower by virtue of any agreement or any specific act of the party, it should be clearly manifest that such was the intention.—*Aikman v. Harsell et al.*, 71.
2. Where the entire estate is devised to the widow charged generally with debts, and

this is not declared to be in lieu of dower, she is not bound to elect; and her claim to dower, the estate being insolvent, is not inconsistent with the vesting of an immediate interest under the will, and is not a refusal of the devise.—*White v. Kane*, 180.

#### DOGS.

See ANIMALS.

#### DRAFTS.

See ATTACHMENT, 16; NEGOTIABLE PAPER, 6.

#### DURESS.

1. Defendants had an employee arrested for embezzlement and demanded \$2,000 of his relatives, threatening to send him to prison unless it was paid. These threats, in accordance with an understanding with defendants, was communicated to the boy's mother, and she, being overcome by them, executed a mortgage to defendants. *Held*, That the mortgage was void for duress.—*Schoener et al v. Lissauer et al.*, 480.
2. The action to set aside the mortgage was not brought until more than six years after it was given. *Held*, That the facts were such that the mortgagor might have brought the action at once, and that it was barred by the statute.—*Id.*
3. One who assumes to act as the legal adviser of another and receives his confidence as such is to be held to the same accountability for his acts, threats and conduct by which he secures an advantage to himself as would be required from an attorney.—*Fisher v. Bishop et al.*, 574.
4. One W., who had, although not an attorney, acted as the legal adviser of plaintiff and his son and had drawn conveyances from the son to plaintiff, was also bondsman for the son, who defaulted and absconded. W. and B. thereupon by means of threats that they would set aside the conveyances as fraudulent procured from plaintiff a bond and mortgage to indemnify them for their liability. *Held*, That the bond and mortgage were procured by duress and were void.—*Id.*

#### EASEMENT.

1. Where a grantor conveys a lot upon which, at the time of the conveyance, water flows from a spring upon another lot then owned and retained by the grantor, the grantee takes as an appurtenant the right to have the water flow as it did at the time of the conveyance to him; and, as against the grantor, the rule is not changed because a piece of land in-

tervenes between the land conveyed and the land retained, through which intervening land the right to take the water is, by parol license, liable to be revoked by the owner.—*Root v. Wadhams*, 11.

# EJECTMENT.

1. Under the Code, §§ 1496, 1497, the plaintiff can now include in the damages for withholding real property the rents and profits, or the value of the use and occupation, and in this respect the old rule is changed.—*De Lisle v. Hunt et al.*, 482.
2. Where the plaintiff served a complaint demanding only damages for the detention, and plaintiff died, and the suit had been pending several years, during which, as alleged, a large amount of rents and profits had accrued. *Held*, that the administrator was entitled to revive the action and serve a supplemental complaint demanding damages for these accruing rents and profits in addition to the damages for detention.—*Id.*

# EMINENT DOMAIN.

1. A railroad corporation may lease its property and transfer its management to a foreign railroad company, even for the whole term of its existence; and the fact of such lease does not take from the lessor company the right to condemnation of land for its uses.—*In re petition N. Y., L. & W. RR. Co. v. The Union Steamboat Co.*, 29, 437.
2. The selection of lands for its use is in the discretion of the corporation, and if the same is made in good faith and there is a necessity for acquiring the lands, and the same are suitable, the courts will not interfere.—*Id.*
3. When there has been no irregularity in the proceedings taken before commissioners appointed under the General Railroad Act to assess the damages to be awarded for property taken for a railroad their report will be confirmed as of course. The legal and appropriate mode of reviewing and considering the effect of the evidence, and the proceedings of the commissioners depending upon it and involving the merits of the controversy, is by the appeal provided by § 18 of the same act. The confirmation of the report seems to be a precedent circumstance to the right of review provided for by this appeal, which is not prejudiced in any respect by this confirmation.—*In re petition of the N. Y. Elevated RR. Co.*, 146.
4. Where the parties have made a contract of bargain and sale, leaving the question of consideration to be decided by certain commissioners named who are to proceed under the statute, and the right to appeal

from their decision is reserved, the court may refuse to appoint the commissioners; but if it appoints them the court is bound, as between the parties, to enforce and carry out the agreement, and cannot, on setting aside their award, appoint new commissioners.—*In re petition of the N. Y., L. & W. RR. Co. v. Bennett et al.*, 282.

5. One of the commissioners in condemnation proceedings was proposed by appellants and selected on their suggestion. After hearing and report it was discovered that the commissioner was not a freeholder. *Held*, That it was then too late for appellants to object to the commissioner's qualification.—*In re application of the N. Y., W. S. & B. RR. Co. v. Hart et al.*, 350.
6. An award made by commissioners to appraise lands required by a railroad company will not be set aside after confirmation for the failure of the company to pay, especially when it appears that no demand has been made upon the company by the land owners and that the latter has appealed.—*In re The N. Y., W. S. & B. RR. Co. v. Townsend*, 429.
7. Where it appeared that soon after the appointment of a commissioner his son was made station agent of the company and was such during the time of his father's service as commissioner, *Held*, that the commission was not impartial and its report must be set aside.—*Id.*
8. If the material allegations of the moving affidavit or verified petition in a special proceeding are not denied by some counter affidavit they stand sufficiently proved for the purposes of an ultimate order; so held, where the allegation of due incorporation of the petitioner was only met by an allegation that repellant had no knowledge or information sufficient to form a belief on the subject.—*In re petition of the N. Y., L. & W. RR. Co. v. The Union Steamboat Co.*, 487.
9. Land used by a steamboat company organized under a charter which does not make it a common carrier or impose public obligations upon it is not so devoted to the public use as to protect it from condemnation under the general railroad act.—*Id.*

See APPEAL, 8; CONSTITUTIONAL LAW, 2-10; FERRIES, 2.

# ESCHEAT.

See ALIENS, 3.

# ESTOPPEL.

1. Payment without protest of a claim for services, e.g. as veterinary surgeon, after action brought thereon and before the re-

turn day of the summons. does not bar a subsequent action for damages by reason of unskillfulness, neglect, etc., in the rendition of the services. Such payment, etc., at the most is only matter of evidence to go to the jury on the question of the existence of negligence.—*Deeves v. Lockhardt*, 185.

2. M. owned a wagon and thereafter borrowed another of plaintiffs. The latter wagon he took apart and had removed, without plaintiffs' knowledge, to the barn of B. The latter wagon being levied upon as the property of M., defendant, hearing that it belonged to plaintiffs, made inquiry as to this of one of them, who replied that they did not own it. In an action by plaintiffs for a conversion, *Held*, That plaintiffs were not estopped, unless the jury found that the plaintiff inquired of knew or ought to have known from his conversation with defendant that the wagon inquired about belonged to plaintiffs.—*Webster et al. v. Scanlon*, 291.

See ATTACHMENT, 15; BAR; EXECUTION, 2; MARRIAGE, 2; MORTGAGE, 2; SHERIFFS; SURETYSHIP, 5.

#### EVIDENCE.

1. When a party gives material evidence as to extraneous facts which may or may not involve the negation or affirmation of the existence of a personal transaction with a deceased person, the adverse party may give evidence of extraneous facts tending to controvert such proof, although these facts may also incidentally involve the negation or affirmation of personal communications or transactions. *Lewis v. Merritt*, 9.
2. It is only where the party making the declarations has, at the time of making them, title to the property that such declarations bind his successor in interest. A declaration to a stranger is mere hearsay.—*Hutchins v. Hutchins*, 44.
3. The meaning of the words "interested in the event," as used in § 829 of the Code, should be construed to mean, and limited in application to, the issue or question as to which the witness is called to testify.—*Moore et al. v. Oriatt*, 68.
4. B. petitioned the court for an order requiring the receiver of an insolvent insurance company to deliver to him certain paid-up policies of insurance which he claimed to own and which were in the hands of said receiver. The receiver resisted the application upon the ground that such policies had been held by the company as collateral security for the payment of a note made by B. *Held*, That B. could show by parol evidence that the money for which the note was given was not a loan but an advance for services to be performed, which had been so performed.—*The People v. The Universal Life Ins. Co.*, 112.
5. In an action for breach of promise of marriage, it appeared that defendant had married another woman, and he was asked how large a fortune his wife had. *Held*, Inadmissible.—*Crandall v. Quin*, 157.
6. Such acts, conduct and declarations of defendant down to the trial, as would, under the facts of the case, have a tendency to limit the damages, may be proved in his behalf in mitigation of damages.—*Id.*
7. Although a question be otherwise proper, yet when it is asked on a redirect examination after the court has ruled out similar questions on the ground that plaintiff is seeking to reopen his case, and when the question has already been fully and fairly answered, it is not error to rule it out.—*Moyer v. The N. Y. C. & H. R. RR. Co.*, 170.
8. In an action for damages to lands, a witness was asked their fair market value before injury. *Held*, Admissible; that this did not exclude evidence of a subsequent natural depreciation or the reverse not occasioned by the injury.—*Id.*
9. Where a party refers the individual with whom he may be dealing to another person for information, that which may be obtained in consequence of the reference is evidence against the party making it.—*Bigler v. Atkins*, 201.
10. In an action to recover damages for alienation of the affections of plaintiff's wife, the complaint alleging that plaintiff and his wife were living happily together, evidence tending to show that they did not live happily together, that the wife had no affection for plaintiff, and that he lost nothing by deprivation of her society is admissible under a general denial.—*Edwards v. Nichols*, 238.
11. In an action on an insurance policy one defense was that the insured, in contravention of its terms, had mortgaged hay, a part of the loss, to one S. The testimony of the insured was taken by commission partly upon written and partly upon oral interrogatories. He was asked on the direct whether he had mortgaged the hay to S. In answer he explained the transaction as being a mortgage of hay not grown. On cross-examination he admitted that this was the same hay burned in the ensuing fall. On the trial plaintiff refused to read this direct interrogatory. For the defense defendant offered to read the cross-interrogatories brought out upon this subject by the direct interrogatories.

The cross-interrogatories began, "When did you give the bill of sale to S.?" Plaintiff objected that there was no proof that such a bill had been given. Upon this ground the court refused to allow either the cross or direct interrogatories on the subject to be read by the defense. *Held*, Error, and that the defense were entitled to read both.—*La Bombarde v. The Agricultural Ins. Co.*, 248.

12. Whenever the evidence offered comes within the purview of the statutes relating to privileged communications it may be objected to by any one unless it be waived by the person for whose benefit the statute was enacted. An executor or administrator of such person cannot make such waiver.—*Westover v. The Aetna Life Ins. Co.*, 318.

13. Acts and declarations of any one conspirator, even in the absence of the others, are competent evidence as against any one of them.—*The People v. Bassford*, 348.

14. It is competent to prove that defendant tried to fabricate evidence for his defense.—*Id.*

15. Although the injured party is a witness and testifies, his exclamations of pain may be proved and used to corroborate other evidence and give a more vivid description of his condition.—*Hagenlocher v. The C. I. & B. R.R. Co.*, 862.

16. In an action for the purchase price of goods sold through an agent the agent's letter ordering the goods is admissible for the purpose of showing that he sent the order promptly and as agreed.—*Griffiths et al. v. Phelps*, 390.

17. The reception of defendant's testimony in his own behalf, to the effect that a package of money which he sent by express in payment for the land in question was addressed to J., from whom plaintiff claims title to the land for the possession of which this action was brought, J. being dead, *Held*, error.—*Stuart v. Patterson et al.*, 441.

18. Where witnesses are unable to state the items composing a stock of goods destroyed by fire and their prices, it is proper for them to refresh their recollection by reference to an inventory of the goods, in the taking of which the witnesses participated, and to a copy of a statement in the handwriting of one of them of footings made by both, the original having been destroyed.—*Ellsworth et al. v. The Aetna Ins. Co.*, 469.

19. Plaintiff and her sons executed an instrument assigning certain life policies and all their rights therein to defendant's assignor in consideration of his giving

certain credits on indebtedness to him by one of the sons, and of his paying off a mortgage. In an action to reform the assignment no fraud or mutual mistake in its execution was alleged. *Held*, That parol evidence was not admissible to show that plaintiff signed it on an assurance that it was intended only as collateral security.—*Marsh v. McNair*, 518.

See ANIMALS, 1; ASSESSMENTS, 1; ASSIGNMENT FOR CREDITORS, 5; CHATTEL MORTGAGE, 4; CIVIL DAMAGE ACT, 1; CONTRACT, 6, 7, 15; CONVERSION, 8; CORPORATIONS, 2, 10, 17; COUNTY TREASURER; DEEDS, 2, 4; EXECUTORS, 7, 17; FORGERY, 2; HIGHWAYS, 4, 5; HUSBAND AND WIFE, 1; LEASE, 4; LIBEL, 1; MALICIOUS PROSECUTION, 7, 8; MUNICIPAL CORPORATIONS, 5; MURDER, 4-6; NEGLIGENCE, 2, 8, 16, 18; NEGOTIABLE PAPER, 5, 9; PARTNERSHIP, 1; PRACTICE, 28, 29; SALE, 4; SERVICES, 1, 2, 4; TRESPASS, 4, 5; WILLS, 12.

#### EXECUTION.

1. In an action where it was doubtful whether the complaint was framed in contract or on tort, the defendant, at the trial, denying all of the facts which sounded in tort, admitted an indebtedness for the money sued for, whereupon plaintiff asked for a direction of the verdict, which was done. *Held*, That thereby plaintiff elected to base his action upon contract and not upon tort. That under the circumstances if any claim was to be made that defendant was liable to arrest, the jury should have been asked to find whether the money left with defendant was a special deposit or a loan. That an execution against defendant's person, under the circumstances, should not be allowed.—*Baker v. Baker*, 64.

2. A householder cannot, by an executory agreement, estop himself from the right to claim the benefit of the statute of exemptions.—*Wilder v. Stewart*, 93.

3. Even though a clause in a lease making the personal property to be put on the premises the property of the lessor as security for rent may give the lessor a right to hold exempt property therefor, the right is lost when he unites other claims with his claims for rent in the judgment.—*Id.*

4. A levy upon sheep includes the wool then growing and all that may afterwards grow during the existence of the lien of the execution, and the lien continues as well after as before severance of the wool. Consequently, a subsequent levy upon the wool, after severance, is subject to the paramount lien of the levy made upon the sheep.—*Youngs v. Williams*, 249.

5. Where the *cestui que trust* is permitted

- by the trustees to occupy the land and cultivate it for his own benefit, as provided by the will, the products of his labor are not "held in trust" for him and thus exempt from execution, but are his property free from any trust and subject to levy and sale.—*Salsbury v. Parsons*, 268.
6. Pension money received in the form of a draft and deposited in a savings bank is exempt from execution under Code Civ. Pro., § 1898. The interest earned by such deposit is also exempt.—*Stockwell v. The Natl. Bk. of Malone et al.*, 295.
  7. An execution issued out of a Justice's Court is not void although the docket fail to state all the particulars required by Code Civ. Pro., § 3140.—*Jones v. Newman*, 328.
  8. The death of plaintiff in an execution in a constable's hands does not suspend the operation of the execution. It will not be a defence to sureties in a constable's bond that it does not comply strictly with the condition required by Chap. 788, Laws of 1872.—*Id.*
  9. An execution against the members of the Board of Commissioners of Charity of the County of Kings, naming them "as" such board, is unauthorized and void, and the sheriff can refuse to execute it, although regular on its face.—*Reid v. Stegman*, 541.

## EXECUTORS.

1. While it may be within the power of the court to amend the complaint after a trial, an amendment the effect of which is to charge the executors personally in respect to a dispute which is carried on by them solely for the benefit of the estate which they represent cannot be sustained.—*Van Cott v. Prentice et al.*, 169.
2. Testator, by his will, directed his executors to pay a certain sum to his wife during her life, and to divide the surplus when his youngest child came of age. The executors were nowhere designated as trustees, except in the appointing clause. *Held*, That it was not intended that they should act as trustees aside from the powers conferred on them as executors, and that the use of the term trustees in the appointing clause referred to the executors in their action under the trust created in the will.—*In re estate of Hood*, 184.
3. On a final accounting the decree directed the executors to hold and invest the balance of the estate pursuant to the powers and directions of the will, but did not provide that they should thereafter become trustees. *Held*, That this did not discharge the executors as such, and that they could not discharge their liability as executors by any future investment.—*Id.*
4. In a case like this the surrogate alone has power to revoke letters.—*Id.*
5. Where the will directs the estate to be kept invested and a profitable investment offers larger than the available assets, the executors have power to supplement them with other funds if they can be legitimately obtained from other persons.—*Barry v. Lambert*, 260.
6. Executors are not precluded from acting as trustees upon other trusts for other beneficiaries if the transaction is not inconsistent with the duties they owe as executors.—*Id.*
7. Declarations of one executor *in extremis*, sustaining plaintiff's claim that an interest in a mortgage held by the estate belonged to him, is admissible against the surviving executor.—*Id.*
8. Where the accounting of executors is sought to be vacated on the ground of the infancy of one of the parties at the time of such accounting, the proceeding therefor must be commenced within one year after the minor attains his majority.—*In re accounting of Tilden's exrs.*, 321.
9. Where several successive accountings are had, each based upon the one preceding, the validity of each previous accounting being unchallenged by any objection, the last decree is binding and conclusive as to the validity of those preceding it.—*Id.*
10. The words "other sufficient cause" in § 3347 of the Code means causes of a like nature with those specifically named.—*Id.*
11. Before a legacy can be held to be made in discharge of a debt, or in compensation for services to be rendered by executors, the will must contain language from which such intention can be inferred.—*In re accounting of Mason et al.*, 391.
12. The executors accounted and by the decree the trust funds were separated and their amounts and condition determined, since which time the executors have acted only as trustees. *Held*, That they were entitled to receive commissions as trustees from the time of the accounting in addition to their commissions as executors.—*Id.*
13. Where a trustee is required to keep trust funds invested and receive and pay out the income annually and he does so, rendering an account to the beneficiary and paying over the balance of income after deducting expenses chargeable thereto, he has the right to deduct full commissions on the income annually received

before paying it over, and in such case a settlement before the court is unnecessary.—*Id.*

14. The payment by a savings bank of money deposited with it by a deceased depositor to his widow, who at the time of such payment was not authorized to collect the debt, is confirmed and legalized by her subsequent appointment as his administratrix, and such payment constitutes a defense to an action against the savings bank to recover the deposit brought by the administratrix *de bonis non* of the depositor's estate appointed after the death of the said widow.—*Whitlock v. The Bowers Savings B'k*, 398.

15. All the executors or administrators should join in an application under Code, § 2706, to discover property alleged to be withheld from them; and generally all should join in any proceeding unless the Code expressly gives a less number power to act.—*In re examination of Slingerland*, 418.

16. An order made under § 2706 is one affecting a substantial right, and an appeal therefrom is analogous to an appeal from an order requiring a party to be examined before trial.—*Id.*

17. In an action by an administratrix to recover property claimed to belong to the estate the declarations of her intestate relative to his purchase of the property in question are not competent in her behalf.—*Cornell v. Cornell*, 463.

18. Evidence that a lease of land was assigned to the intestate by written assignment and that the saw-mill thereon was also assigned to him is sufficient to show that he had the legal title to the lease and mill.—*Id.*

17. Testator's will bequeathed \$2,500 to plaintiff, which was to be kept invested by the executors, and out of the income they were to pay for her support and education and pay the principal and accumulations of interest to her at the age of 21. No fund was set apart for her and no reinvestments of accumulated interest were made. A bond and mortgage for \$2,500 given to testator by one of the executors and on which some payments had been made was assigned to plaintiff, and on foreclosure the mortgagor paid the contract debt with simple interest. *Held*, That the mortgage could not be considered a trust fund set apart for plaintiff's benefit; that an account should be made from the beginning of the executorship, and full interest charged on the principal of the legacy.—*Remington v. Walker*, 472.

See BANKS, 2, 4; BAR, 1; EJECTMENT, 2; EVIDENCE, 12; LIMITATION, 6; MORTGAGE, 12;

SERVICES, 5; SURROGATES, 1-5, 8; TAXES, 1, 2.

#### EXEMPTION.

See EXECUTION, 2, 3, 5, 6; TAXES, 12.

#### EXTRA ALLOWANCE.

See CONTRACT, 11; COSTS, 1, 4, 6.

#### FACTORS.

See AGENCY.

#### FALSE IMPRISONMENT.

See ARREST, 1; PLEADING, 1.

#### FALSE REPRESENTATIONS.

1. Where both the vendor and vendee of land went upon the premises to be sold and the vendor correctly pointed out the boundaries and stated that the premises contained a certain number of acres, which may overrun or fall short, that he bought them as containing that number, but had never had them surveyed, and it does not appear that he had knowledge that his statements were false, he is not liable as for false and fraudulent representations in case the quantity of land is less than he stated.—*Tyler v. Guy*, 56.

See ARREST, 2; PRACTICE, 19.

#### FERRIES.

1. Chap. 259, Laws of 1882, authorizing the lessees of certain ferries to acquire the right to use a specified pier and lands adjoining, is not a grant to a private corporation within § 18 of Art. 3 of the Constitution, nor does it grant any exclusive privilege, immunity, or franchise.—*In re application of the Union Ferry Co.*, 164.

2. If the use to which the property is to be put is certainly a public one, the legislature has power to determine the necessity of the exercise of the right of eminent domain and the extent to which it shall be carried, and its determination is not reviewable.—*Id.*

#### FIRE INSURANCE.

1. An oral contract to insure property for one year against loss by fire by a written contract to be thereafter delivered, but to take effect immediately, is valid, and if a loss occurs before the written contract is delivered the insured may recover on the oral contract.—*Dietrick v. The Firemen's Fund Ins. Co.*, 16.

2. A clause contained in a policy of fire insurance declaring that the agent of the

company has no authority to waive, modify, or strike from the policy any of its printed conditions, applies only to agencies of the company maintained separately and distinctly from the office of the company itself, and not to the officers and immediate employees of the company.—*Anderson v. The Continental Ins. Co.*, 85.

3. A policy which has become a valid and subsisting contract cannot be cancelled without notice to the person for whose benefit it is issued.—*Id.*
4. The fact that an insurance company has obtained reinsurance upon a policy issued by it, and that entries have been made in its books charging the premium to the insured, may be considered in determining the understanding of the company as to the effect and validity of the policy.—*Id.*
5. An insurance agent can authorize his clerk to countersign policies, and the act of the clerk in such cases is the act of the agent and binds the company just as effectually as if it were done by the agent in person, even though the policy requires that it shall be countersigned by the authorized and commissioned agent.—*Clark v. The Glens Falls Ins. Co.*, 197.
6. Where the proofs of loss required by the terms of a policy are defective, the neglect of the insurance company to reject and return them within a reasonable time is a waiver of any defect or deficiency therein.—*Id.*
7. Where proofs of loss were forwarded June 19th, 1879, were received by the company June 21st, 1879, and the company retained the proofs furnished until the 28th day of the same month, two days after the time for furnishing proofs had expired, without objecting to them, and then returned them on the ground that the proofs were not made by plaintiff, *Held*, That it was for the jury to determine whether there was or not such neglect on the part of defendant as to constitute a waiver.—*Id.*
8. A fire insurance policy contained a provision that if the premises should "become vacant or unoccupied" etc., the policy should be void. About a month before the fire the premises were vacated by a tenant, and the assured prepared to occupy them, making repairs and moving in her furniture; but at the time of the fire she had not gone into the house to stay and no one was living in it. *Held*, That the policy was avoided.—*Barry v. The Prescott Ins. Co.*, 810.
9. In an action by an insurance company against another on a policy of re-insurance issued by the latter, after judgment

recovered against the former fixing the amount of loss, the re-insurer cannot inquire into the merits, but is bound to pay such proportion of the loss as its re-insurance bears to the sum originally insured.—*Jackson v. The St. Paul F. & M. Ins. Co.*, 402.

10. A policy was issued upon a brick building used for planing and wood-working, which provided that it should be void in case of increase of risk by the erection of neighboring buildings. Thereafter a wooden building was erected six or seven feet distant to be used as a drying house. Evidence was given tending to show that the close proximity of such a building to a brick building ordinarily increases the hazard of the latter. *Held*, That the court was justified in assuming that there was an increase of risk.—*Cole v. The Germania Fire Ins. Co.*, 455.
11. The knowledge of the agent of the assured as to an increase of risk at the time of applying for a renewal is imputable to his principal, and his failure to disclose it has the same effect as if the principal had personally failed to do so.—*Id.*

See EVIDENCE, 11, 18.

#### FORCIBLE ENTRY.

1. A mere threat or declaration of intention to take possession of real property is not sufficient upon which to base a finding of a detention and damages by reason thereof.—*Pharis v. Gere*, 491.

#### FORECLOSURE.

See MORTGAGE, 4, 5, 8-18, 17, 18, 21; PARTITION, 8; RECEIVERS, 3, 5, 6.

#### FORGERY.

1. The acquittal of one of several persons indicted for forgery is no legal interruption to the conviction of another of them.—*The People v. Bassford*, 848.
2. It is competent to prove that defendant was on other occasions connected with the other persons indicted in the same business as that in which the alleged forgery was committed.—*Id.*

#### FRAUD.

1. Dishonest conduct of a person, in the absence of any definite and established relation of confidence, does not furnish any valid legal ground for setting aside a contract in an action to recover damages by reason of undue and improper influence exercised over the party with whom he has been dealing.—*Stout et al. v. Smith*, 59.



2. In an action for damages for fraud in exchanging lands it appeared that defendant, who was an attorney and also a banker, drew all the papers. It did not appear that he was ever employed by plaintiffs in any litigation or received a retainer from them or agreed to act as their attorney. *Held*, insufficient to establish the relationship of attorney and client between them.—*Id.*

3. S. being indebted to B. and others, with intent to defraud them, mortgaged his land to his daughter, a part of the consideration being the face and several years' interest on his note given her on her marriage. This mortgage was assigned, through a third person, to her husband, who foreclosed it, and with knowledge of all the facts bought on the sale, pending this action brought by plaintiff, as receiver appointed under B.'s judgment against S., to set aside the foreclosure judgment. *Held*, That the sale was of no effect as to plaintiff's rights, as the husband was not an innocent purchaser and paid no new consideration, he applying his bid on former valid mortgage liens which he held on the property and which were prior to the fraudulent mortgage, and upon the mortgage foreclosed; that as to existing creditors the mortgage was void to the amount of S.'s promissory note and interest.—*Smith v. Shaul et al.*, 91.

4. *Query*. Whether, if the mortgage to the daughter was given and received with intent to hinder creditors, it was not wholly void, although part of it was for money actually loaned the father by the daughter?—*Id.*

5. Where defendant offered as a friendly act to purchase certain stock for plaintiff, representing that it could be bought for less than it was worth, but by arrangement with the vendor paid less than the price authorized by plaintiff and retained the balance, *Held*, That plaintiff could not rescind the transaction and recover back the amount entrusted to defendant, but could only recover the excess over the price paid.—*McMillan v. Arthur*, 136.

6. Where an insolvent, offering a compromise, requests some creditor to accept the offer and advise its acceptance by other creditors, the latter by doing as requested does not become the agent of the debtor to make the settlement or commit a fraud upon those he advises to accept.—*Bacon v. Clafin et al.*, 200.

7. Where such creditor was afterward employed by other creditors to induce the debtor to pay them a sum in addition to the offer, in an action to recover the agreed compensation for such services, *Held*, That a motion for nonsuit on the ground that a double agency existed and

thereby a fraud was practiced on defendants was properly denied; that the question of fraud was for the jury to determine.—*Id.*

8. A mortgage belonging to plaintiff's testator had been foreclosed by the plaintiff and a sale was about to be had. Defendant then said to plaintiff that the mortgagor had placed in his hands stock to bid off the property and pay plaintiff his claim in full, if the sale was adjourned for ten days; that in ten days he would be prepared to pay. In reliance on this promise the sale was adjourned, and when had resulted in a large deficiency. In an action on this promise, *Held*, That the promise was void under the statute of frauds, even though the stock had been placed in defendant's hands as he represented.—*Ackley v. Parmenter*, 327.

See ASSIGNMENT, 1; BANKS, 7; CONTRACT, 8, 12; CREDITORS' ACTION, 4; GUARDIAN, 1; MARRIAGE, 3; SALE, 2, 3.

#### GIFT.

See BANKS, 10; CHECKS.

#### GUARANTY.

1. A guaranty of payment of A.'s indebtedness to plaintiff is released by acceptance by plaintiff of notes in renewal of paper originally given for such indebtedness in accordance with the terms of guaranty.—*The D., L. & W. R.R. Co. v. Benkhard et al.*, 222.

#### GUARDIAN.

1. Where one who had just become of age was induced by fraud to allow a person in collusion with his guardian to appear for him in a Surrogate's Court upon the settlement of the guardian's accounts, and a decree was thereafter entered discharging the guardian, *Held*, that this decree was, under the circumstances, no defense to the guardian in an action by the ward to set aside a fraudulent transfer made to him by the guardian about the time of the decree.—*Douglass v. Low*, 297.

2. Where the co-tenant of an infant has collected and retained the whole of the rents the general guardian of the infant may maintain an action against him for the infant's share as for money had and received.—*Coakley v. Mahar*, 376.

3. In such an action the defendant cannot counterclaim for improvements made without the plaintiff's assent.—*Id.*

See PRACTICE, 11; SURROGATES, 8, 9.

## HIGHWAYS.

1. A bridge being out of repair, defendants barricaded it against travelers until the repairs should be made. Plaintiff's horses escaped from him, ran away, and one of them was injured by the means used to barricade the bridge. *Held*, That defendants are not chargeable for the injury.—*Lane v. Wheeler et al.*, 240.
2. In an action against commissioners of highways for an accident caused by a hole in a bridge, the referee found that none of the defendants had any knowledge prior to the accident that the bridge was out of repair, and that no wilful omission of duty had been established upon the part of any of them. *Held*, That the report in favor of defendants must be set aside.—*Cousins v. Curncross et al.*, 435.
3. Such commissioners owe to the public an active duty—the duty of inspection of highways within reasonable periods, and one question always is whether, under the circumstances, they were bound to know of the defect; and this apart from any question of actual knowledge or wilful neglect.—*Id.*
4. In an action for obstructing a private road the record book of roads of the town and entries therein indicating the laying out of the road are admissible.—*Brown v. Rice*, 479.
5. In such action evidence that plaintiff has used the road for over forty years and that there is no other road from his premises to the public highway is competent; so also an award between the parties fixing the width of the road.—*Id.*
6. Applicants for a highway are not proper persons to serve as jurors to determine the necessity of the proposed road, and their names should be excluded from the jury box before the drawing.—*The People ex rel. Edwards v. Potter*, 507.
7. The omission of a name from the box by a mere clerical error, where no harm results to the owner of the premises therefrom, will not invalidate the proceedings.—*Id.*
8. Where the commissioners of highways divided the town into road districts and located defendant's land as in district No. 15, and duly filed the instrument, but said land was subsequently assessed for highway labor in district No. 16, and was sold and conveyed by the comptroller to plaintiff for non-payment of the taxes assessed for such labor, *Held*, That it will be presumed that said land was located in that district when the assessment for highway labor was made; that said commissioners had subsequently made another order dividing the town into road dis-

tricts and located said land in the latter district.—*Jones v. Chamberlin et al.*, 587.

9. The omission of the \$ mark before the figures under the headings "total value" and "tax," does not invalidate the assessment roll where it is evident that the figures were used to represent dollars and cents, and nothing else.—*Id.*

See CONSTITUTIONAL LAW, 8; VENUE; VILLAGES.

## HUSBAND AND WIFE.

1. In an action by a husband to recover for injuries to his wife, his right to recover is limited to such special damages as he has sustained thereby. Evidence as to such damages is inadmissible unless they are pleaded; but the question of admissibility in that respect is not raised by an objection that the evidence is "incompetent and immaterial."—*Uertz v. The Singer Mfg. Co. et al.*, 219.
2. When the right of recovery is limited to actual special damages proved, the verdict should be set aside if it greatly exceeds the damages established by the evidence.—*Id.*
3. Where a husband owes his wife for money earned by her before marriage he has a right to secure her for it, and where such debt exceeds the value of his interest in land which he conveys to her the fact that other money earned by her after marriage was applied in payment of its purchase price is immaterial to affect the validity of the deed.—*Harbottle et al. v. Farrell et al.*, 581.

See ABANDONMENT; BANKS, 10; CURTESY, 2.

## INDEMNITY.

1. When it is the custom of an insurance company in the case of rival claimants to the proceeds of a policy to pay the money into court and compel the claimants to litigate their rival claims between themselves, but at the request of one of such claimants the company departs from such custom and pays over the money to him taking a bond conditioned to indemnify the company from all costs, liabilities, charges, damages and expenses to which it may be subjected in consequence of said payment, and the other claimant subsequently brings an action against said company for the proceeds of the policy but is defeated, the indemnitors upon such bond are liable for the expenses incurred by the company in defending said action.—*The Mutual Life Ins. Co. v. Holt et al.*, 118.
2. When it appears from the circumstances preceding and attending the giving of

such a bond that it was the intention of the parties to protect the company against the happening of a certain contingency, the bond will be construed so as to give effect to this intention although the contingency in question was not mentioned in the recital of the bond.—*Id.*

3. In an action on a bond of indemnity whereby the sheriff was indemnified from any damages which might accrue to him for levying under an execution upon personal property which he might judge belonged to the judgment debtor, the court was requested to charge that if neither the sheriff nor any of his deputies judged the property taken under the execution, in reference to which the indemnity applied, was owned by the judgment debtor, then defendant was entitled to a verdict. The court refused so to charge. *Held*, Error, notwithstanding the fact that there was no evidence that the person making the levy did not judge the property levied upon to be owned by the judgment debtor. That the mere act of levying is no evidence that the property levied upon was judged by the person making the levy to belong to the judgment debtor.—*O'Donohue et al. v. Simmons*, 485.

See SHERIFFS.

#### INDIANS.

1. The treaties of 1789 and 1793 made by the state with the Cayuga Nation were public transactions, and in case of a violation by either party the other contracting party alone can demand satisfaction. Neither a citizen of the state nor any portion of the members of the Indian Nation, unless recognized by the state as the Nation, can complain.—*Cayuga Indians v. The State*, 439.

#### INDICTMENT.

See CRIMINAL LAW, 3, 4, 6.

#### INJUNCTION.

1. The defendant Trust Co. held certain bonds and stock of a corporation as trustee to secure certain notes of such corporation. Default was made in the payment of such notes, and the Trust Co. proceeded to sell the bonds and stock pledged to it. Plaintiff then commenced an action in which he procured an injunction prohibiting such sale, which was subsequently vacated. On an application to assess the damages sustained by the Trust Co. by reason of such injunction, *Held*, That the interest on said notes, which had accrued during the time said injunction was in force, was a proper item to be included in the estimate of such damages under § 624

of the Code of Civ. Pro.—*Friend v. The Mercantile Trust Co.*, 382.

2. An injunction will not lie under the State sanitary laws to restrain the sale of imports of teas in original packages, though such teas be adulterated, unless it is shown that such injunction is imperatively necessary to prevent serious danger to human life or serious detriment to health.—*The Health Dept. of N. Y. v. Purdon et al.*, 447.

See RAILROADS, 14.

#### INSOLVENT INSURANCE COMPANIES.

See EVIDENCE, 4.

#### JUDGMENT.

1. No final judgment can be entered upon a decision of the Special Term sustaining a demurrer to one of the causes of action set forth in the complaint, and dismissing the complaint as to that cause of action with costs to the defendant, and directing judgment to be entered accordingly, while the issues of law raised by the other grounds of demurrer remain undetermined. The entry of a judgment for costs by defendant is, in such case, irregular; but the remedy of plaintiff is by application to the Special Term, and not by appeal.—*Robinson v. Hall*, 4.
2. Plaintiff had verdict for \$44 and judgment was entered therefor. Defendant was entitled to costs and another judgment was entered in her favor for \$74 costs. On defendant's motion both judgments were set aside and judgment was directed for the residue of the costs after deducting the amount of the verdict. *Held*, No error, although plaintiff had assigned his verdict to his attorneys for their services before the judgment for costs was entered.—*Warden v. Trost*, 101.
3. A corporation having bid in certain property on foreclosure and entered judgment for deficiency, subsequently agreed with the mortgagor to make him a new loan and to reconvey said property to him and satisfy the judgment on his giving a mortgage on it for the deficiency and one on other property for the loan, which agreement was carried out and a satisfaction of the judgment executed but not delivered. In an action to foreclose the last mentioned mortgage it was set aside for usury. *Held*, That the company was thereby deprived of the only consideration for its agreement to satisfy the judgment; that the judgment was thereby revived, and that the satisfaction should be surrendered by the holder to the representative of the corporation.—*Russell v. Nelson et al.*, 535.
4. One of the makers of a joint and several

promissory note was sued upon it by the holders and judgment entered against him only. He subsequently transferred to the holders a bay mare, without any agreement as to the price it was to be received at: the holders agreed that the mare should be taken in satisfaction of the judgment as to the maker sued, in any event, that they would sell the mare and after deducting the costs incurred would apply the balance *pro tanto* in satisfaction on their claim on the note under the judgment against the other maker. *Held*, That by the transfer of the mare the judgment was satisfied as to both makers.—*Coonley v. Woodruff*, 570.

See APPEAL, 5, 6, 9; ASSOCIATIONS, 3; CORPORATIONS, 19; CREDITOR'S ACTION, 5, 6; JUSTICE'S COURT, 1; LUNATICS, 2; PARTITION, 3; PLEADING, 16; PRACTICE, 32.

#### JURISDICTION.

See PRACTICE, 11; STOCKS, 1; TAXES, 8.

#### JURORS.

1. Where a juror testified that he had a strong impression as to the guilt or innocence of the prisoner and that evidence would have to remove such impression before he could give a candid opinion, and that he had no *special* doubt that he could give an impartial verdict upon the evidence, *Held*, That it was error to overrule the challenge.—*The People v. Tyrrell*, 493.
2. Where such error causes the prisoner to exhaust his peremptory challenges it is sufficient to authorize the granting of a new trial.—*Id.*
3. One of the jurors visited the home of defendant, examined the premises and had some conversation with defendant. *Held*, Misconduct for which a new trial should be granted.—*Id.*

See CRIMINAL LAW, 2; HIGHWAYS, 6, 7; MURDER, 3, 4.

#### JUSTICE'S COURT.

1. In an action in a Justice's Court a demurrer to a sworn complaint was overruled with leave to answer. Defendant failed to answer, and thereupon the justice without any proof of plaintiff's claim entered judgment for the full amount claimed. On an appeal from the judgment of the County Court affirming the judgment, *Held*, Error; that plaintiff ought to have proven his claim, and that until then no judgment should have been rendered in his favor.—*Outman v. Schmidt*, 130.
2. Though the amount deposited in a bank,

as well as the checks drawn upon and paid by the bank, exceed \$400, these items do not constitute a matter of account between the parties of which a justice's court has no jurisdiction, where the only item in dispute is a certain check claimed to have been drawn by the depositor.—*Brisbane v. The Bank of Batavia*, 270.

See COSTS, 5; EXECUTION, 7.

#### LACHES.

1. One T., who was plaintiff's attorney in a foreclosure action, purchased the property himself and two years thereafter sold it and took back a mortgage which he afterwards assigned to defendant as security for loans. In an action to recover moneys paid on the mortgage and for an assignment thereof, *Held*, That plaintiff by failing to enforce her right to the property or the proceeds before the sale and assignment lost her right to the land or mortgage, and that she had no rights which could be enforced against the assignee of the mortgage.—*Phillips v. The Highland Nat'l Bk*, 192.

#### LANDLORD AND TENANT.

See LEASE.

#### LEASE.

1. A new stipulation may, by consent of the parties, be added to a contract after its execution, if such stipulation is evidenced and executed in the mode that the original contract is required to be evidenced and executed.—*Vidvard v. Cushman*, 7.
2. Where the added stipulation is written in the lease by the lessor in the presence and with the assent of the lessee, it is unnecessary to re-sign the lease.—*Id.*
3. Defendant let a house to H. until May 1, 1883. In May, 1882, H. sublet a room on the ground floor to plaintiff. On April 1, 1883, H. surrendered the lease to defendant, but plaintiff continued in possession of his room. Defendant in April, 1883, employed G. to put a new roof on the building. This was not done to stay waste, but to improve the estate. Plaintiff was not consulted, but his possession was not interfered with. After the old roof was taken off G. notified plaintiff to protect his goods, as the new roof could not be put on that day. Plaintiff promised to do so. A heavy rain came on and plaintiff was damaged. *Held*, That defendant was liable.—*McVie v. McNaughton*, 89.
4. In an action to recover rent due upon a lease, a breach of covenant to keep the rooms heated by means of a steam heating apparatus is a proper subject of

- counterclaim, and it is error to exclude evidence to show that the rooms were insufficiently heated and rendered so uncomfortable that the tenant could not work therein; and the fact that he continued to occupy the rooms during the time the rent accrued is no bar to recover damages for breach of the covenant, especially when the lessor promised to improve the heating.—*Ellwood v. Forkel*, 95.
5. The lessor in a lease under seal in which there is no undertaking on his part to make repairs is not chargeable with the expense of repairing.—*Simpson v. Swikehard*, 107.
  6. While the covenants in a lease under seal cannot be modified by parol executory agreement, yet the complete execution of the parol agreement may operate as a satisfaction of the undertakings in the lease.—*Id*
  7. Proof that the value of the products of a farm exceeded the rent, and that the lessor did not take them, will not constitute a defense to an action against the surety on the lease under a covenant that the products should be the property of the lessor until the rent is paid. It must appear that the lessor took them or was negligent in not doing so.—*Clarke v. Quinn*, 110.
  8. An action may be maintained against the surety on a lease without joining the principal.—*Id*.
  9. A landlord by instituting summary proceedings to evict his tenant affirms the lease as it exists, and is precluded from seeking a reformation thereof as a defense to an action brought to restrain the prosecution of such summary proceedings.—*Lovatt v. Watson et al.*, 193.
  10. An action for negligence against the landlord cannot be maintained by the tenant for personal injuries caused by the giving way of stairs unless the landlord knew the stairs were unsafe to use or from the facts and circumstances in the exercise of ordinary care and prudence he should have known of their dangerous condition.—*Spellman v. Bannigan*, 203.
  11. The contract of a landlord to put or keep in repair does not contemplate personal injuries which may follow a breach of the contract and indirectly or remotely grow out of it. Such damages are accidental and remote, nor is a landlord liable to his tenant for a breach of his contract to repair unless he had notice of the necessity for such repairs and then only after a reasonable time for him to make such repairs.—*Id*.
  12. Where the landlord has created no nuisance and is guilty of no wilful wrong or fraud or culpable negligence he is not liable for any injury suffered by any person occupying or going upon the premises during the term of the lease.—*Edwards v. The N. Y. & H RR. Co.*, 280.
  13. Negligence on the part of a landlord is not to be inferred simply from the fact that the structure which he lets breaks down; it must be shown he had reason to know that it was dangerously weak and imperfect.—*Id*.
  14. Defendant was the general assignee for the benefit of creditors of one M. and under the assignment took possession of the stock of goods owned by M. and entered upon the premises in which they were kept, which M. leased from plaintiff. Defendant notified plaintiff that he could not assume the lease of the premises and offered to pay \$50 a month as rent therefor, which plaintiff refused, asking \$100, and threatened to dispossess defendant unless he paid the latter sum, which defendant refused to do. Plaintiff did not dispossess defendant, however, and the latter remained upon the premises for two months while selling off the goods. In an action upon the lease to recover two months' rent, *Held*, That the defendant's occupancy was not as assignee under the lease, but as merely a tenant by sufferance. That it seemed that the defendant was liable for rent at the rate of \$100 per month.—*Weil v. McDonald*, 440.
  15. A covenant by a tenant to repair does not enure to the benefit of a stranger who sustains an injury in consequence of its breach, but can only be enforced by the landlord or his assigns.—*Odell v. Salomon et al.*, 473.
  16. The owner or occupant of a building is not chargeable with the duty of constant inspection of the premises; reasonable care in their use so that they do not cause injury to others is all that the law requires.—*Id*.
  17. The fact that a defect was discovered by an expert after close examination and keen scrutiny is not sufficient to charge the owner or occupant with negligence in not having discovered and remedied it.—*Id*.
  18. The defendant in an action to recover an installment of rent cannot interpose a defense which was equally applicable to an action for a prior installment in which he did not interpose said defense, but permitted a recovery.—*Townsend v. Read et al.*, 509.
  19. A sub-tenant cannot plead a technical merger as a defense to an action for an installment of rent brought by the original landlord under an assignment to him of the lease with the sub-tenant, where the

rent is payable on the first of each month, and the assignment was made during the month sued for and after the first.—*Id.*

20. Where the rent is payable on the first of each month in advance, and the first of the month is Sunday, the tenant has till midnight of the second to pay his rent.—*Boehm v. Rich*, 510.

21. In such a case where the landlord on the second of the month obtains a summons in summary proceedings to dispossess the tenant for non-payment of rent, and the tenant before the return day removes in pursuance thereto, this constitutes a surrender by the tenant and an acceptance by the landlord of the premises, and the tenant is not liable for the ensuing month's rent, even though the landlord does not continue the proceedings.—*Id.*

22. A renewal of a lease operates as a renewal of all the provisions contained in or made a part of the lease.—*Wadsworth v. Wadsworth et al*, 320.

23. A farm lease made in February, 1879 for the term of one year, provided that if the lessee should not lease the farm for 1880, he must deliver to the lessor, by September, 1880, one-third of the crop of winter wheat raised on the pasture lot. The lease was renewed for one year from April, 1880, and in the fall the lessee put in a crop of winter wheat upon said lot, and in the summer of 1881 harvested the same. The lease was not renewed for 1881. Plaintiff claimed one-third of said wheat. *Held*, That said provision of the lease continued in operation upon the renewal, and plaintiff was entitled to recover.—*Id.*

24. At a meeting of a Masonic lodge, a quorum being present, by a majority vote a committee was authorized to lease a room for its use. The by-laws gave such a majority power to act. The committee did so and signed the lease with the name of the lodge, adding "by their committee. S. J. T., L. T. F. and C. H." They affixed their own seals. *Held*, That the lodge was bound and that an action on the lease was well brought against its treasurer.—*Cohn v. Borst*, 561.

See MORTGAGE, 23-27.

#### LEGACIES.

See WILLS, 17, 18.

#### LIBEL.

1. In an action for libel in publishing plaintiff as a swindler in having obtained credit by false representations, where the truth of the statement is pleaded in justi-

fication and mitigation, evidence that defendant's general agent, to whom the representations were made, communicated them to defendant and that it relied upon them, is competent in mitigation of damages.—*Kimball v. The Herald Co*, 34.

2. Publishing an article which states that a judgment has been recovered against a person is not actionable unless special damages are alleged and proved. Such a publication is not an act from which the law presumes that damages ensued.—*Woodruff v. The Bradstreet Co.*, 97.

3. The complaint in an action by a charitable corporation for a libel on account of which it is alleged that various persons declined to make charitable donations to plaintiff which it otherwise would have received should state the names of the persons who, for that reason, declined to make such contributions, and if it fails to state such names the plaintiff will be ordered, upon motion, to serve a bill of particulars containing such statement.—*The N. Y. Infant Asylum v. Roosevelt et al.*, 331.

#### LICENSE.

See CANALS.

#### LIFE INSURANCE.

1. Where a life insurance policy provides for an accumulation and preservation of dividends which it had earned at the expiration of ten years from surplus profits derived from lapsed policies, which dividends were to be apportioned equitably and applied to an annuity bond, or paid in value to the assured in cash. *Held*, That the relation created between the company and the insured is not fiduciary, but rests in contract, and that the insured is not entitled to an accounting; the determination of the amount of dividend being confined to the company, and only to be questioned in an action alleging non-performance of contract obligation.—*Uhlman v. The N. Y. Life Ins. Co.*, 5.

See INDEMNITY, 1, 2.

#### LIMITATION.

1. One W., who was indebted to plaintiff, conveyed certain real estate to his sons by deed which charged the land with and the grantees assumed to pay said indebtedness with interest. *Held*, That the acknowledgment of the indebtedness, although made to strangers to it, was just as effectual to defeat the statute of limitations as if it had been made directly to plaintiff or his authorized agent, as it was intended to be communicated to and influence him.—*De Freest v. Warner et al.*, 18.

2. The contract of a carrier to carry a passenger is an important element in the passenger's right to recover for a personal injury caused by the carrier's negligence, but only as inducement and not as substance. The real ground of action is the tort or negligent act of the carrier, whereby the passenger is injured; and such action must be brought within three years.—*Webber v. The Herkimer & M. Street R.R. Co.*, 47.
3. A failure by the owner of property taken for canal purposes to make claim for damages within one year, as prescribed by 1 R. S., 225, § 48, divests him of all right thereafter to claim damages arising as an incident to such taking.—*Mark et al. v. The State*, 63.
4. The claims mentioned in Chap. 321, Laws of 1870, are of a different character from those provided for by said § 48.—*Id.*
5. An action by a husband to recover damages for the loss of services of his wife, caused by a personal injury to her inflicted through carelessness on the part of defendant, is not an action to recover for a personal injury, but is one to recover damages for an injury to property, and is not barred by the statute of limitations until the expiration of six years.—*Groth v. Washburn*, 75.
6. An administrator sold his intestate's land to pay debts. The petition omitted the name of one of the intestate's heirs, but the proceedings were otherwise regular. *Held*, That the omitted heir was not divested of his title, and he is not barred by the five years' statute of limitations from recovering his share in the lands sold.—*Jenkins v. Young et al.*, 307.

See BANKS, 2, 12; CORPORATIONS, 11; CREDITOR'S ACTION, 7; DURESS, 2; EXECUTORS, 8; MORTGAGE, 24; MUNICIPAL CORPORATIONS, 6; TOWNS, 2.

#### LOANS.

1. In an action to recover an alleged loan it was shown that plaintiff's intestate received certain checks, and that on the following day they were in the possession of and used by defendant's testator, with whom intestate resided. *Held*, That no loan was proved; that if there was a direct transfer it must be deemed a voluntary delivery in payment of an existing liability rather than a loan.—*Poucher v. Scott*, 175.

#### LOTTERY.

1. Upon the trial of an indictment charging the crime of contriving or assisting in contriving a lottery, the confession of the

defendant, consisting of his explanation of the contrivance to a purchaser, is sufficiently corroborated by proof of such purchase and the production of the article purchased to warrant a conviction upon it under § 895, Penal Code.—*The People v. Runge*, 88.

2. It is not necessary, in order to warrant a conviction under § 825 of the Penal Code for contriving or assisting in contriving a lottery to prove that any person paid or agreed to pay anything for any chance for which the lottery provides.—*Id.*

#### LUNATICS.

1. A sale to a lunatic will be set aside by a court of equity, and the return of the consideration adjudged, when the fact of lunacy existing at the time of the sale is established, whether the defendants had or had not knowledge of its existence, except that, where the sale is for the benefit of the lunatic, and the defendants, if they acted in good faith, can not be put in *statu quo*, the sale will be upheld; and allegations in the complaint in an action brought for the purpose of setting aside the sale, that defendants wrongfully and unlawfully effected such sale, etc., will not change such action from one in equity to one for fraud and deceit.—*Johnson v. Stone et al.*, 159.
2. When the complaint in an action to set aside a sale of stock made to a lunatic charges a joint liability against defendants for the return of the consideration, but it appears upon the trial that they owned different amounts of the stock sold and received different proportions of the purchase money, a judgment can be entered ordering the return by each defendant of the amount received by him.—*Id.*

See TAXES, 13.

#### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution the burden of showing want of probable cause is upon the plaintiff.—*Marks v. Townsend et al.*, 10.
2. When final judgment is entered in favor of a party on trial, the prosecution is so far terminated that he may sue for malicious prosecution.—*Id.*
3. While a suit is pending no action in the nature of a suit for maliciously or without probable cause instituting the pending suit can be maintained.—*Jones v. McCaddin*, 58.
4. The question as to the advice of counsel is for the jury, as they are to determine in considering the question of probable

cause whether such advice was sought in good faith.—*Morton v. The Metropolitan Life Ins. Co.*, 54.

5. In an action for malicious prosecution the Court charged the jury that if they should find that the prosecution of plaintiff was authorized by the corporation and that it had failed, they should then consider the question of probable cause; that upon this branch of the case they were to determine whether the charge of embezzlement was true; if it was, then there was an end of the case and the verdict would be for defendant. If true in part only, then plaintiff was not necessarily to have a verdict; they were then to consider whether defendant had probable cause to believe the charge true, and if it had, then the verdict was to be for defendant. *Held*, No error.—*Id.*
6. A complaint for malicious prosecution need not allege that the accusation was false or falsely made.—*Avery v. Blair*, 178.
7. Evidence to show that defendant employed counsel to try the indictment against plaintiff is proper.—*Id.*
8. Where the plaintiff simply shows that defendant was a witness against him before the Grand Jury, evidence tending to show what he testified to before the Grand Jury is inadmissible.—*Id.*
9. Where the facts relied upon to make out a want of probable or reasonable cause are in dispute, it is the duty of the court to submit that question to the jury.—*Id.*

See CORPORATIONS, 1, 2; PLEADING, 1.

#### MANDAMUS.

1. A mandamus cannot be granted to compel the issuing of a permit to the trustees of the Brooklyn Bridge to enter upon certain streets to lay foundations for the approaches to the bridge where the effect thereof will be to allow the trustees to place pillars or columns in such streets.—*The People ex rel. Stranahan v. Thompson*, 2.
2. Chap. 899, Laws of 1867, prohibits the interposition of any obstacle to the free and uninterrupted use of the streets, and confers no authority which authorizes the exercise of any discretion in determining the character of the obstruction.—*Id.*
3. While the records in the office of a county clerk or register are public and every person has a right to examine and copy them at reasonable times, yet the clerk or register has the right to decide as to the manner in which such right shall be exercised and to say how many persons may be sent to work at the office

at one time by a title guaranty company, and a mandamus to compel the clerk or register to allow the employees of such company to make searches and copy records is not allowable or proper.—*The People ex rel. The German Am. L. & T. Co. v. Richards*, 366.

See APPEAL, 20.

#### MARINE COLLISION.

1. Defendant was owner of a steam yacht licensed to proceed from port to port in the United States and by sea to any foreign ports. The yacht was coming up the Hudson river at 9 P. M. under steam, with sails furled, showing, under rule 3 of § 4233, U. S. R. S. at the fore-mast head a bright white light, on the star-board side a green light, and on the port side a red light. She collided with a steamboat belonging to plaintiff's testator. In an action by the latter for damages, *Held*, That the lights shown were correct and that the yacht was not required also to show a central range of two white lights, specified in rule 7 of said section.—*Chase et al. v. Belden*, 99.

#### MARINE INSURANCE.

1. A clause in a policy of insurance on a canal boat, providing for a termination of the risk if the voyage cannot be finished the same season in consequence of ice or the closing of navigation, does not become operative by reason of a temporary stoppage of the boat by ice and closing of navigation, which was afterwards reopened so that the voyage was resumed.—*Delahunt et al. v. The Aetna Ins. Co.*, 82.
2. The persons named in the policy as the assured, being in possession of the same, are the proper parties in interest and entitled to maintain the action.—*Id.*
3. Where an open policy contained a clause of forfeiture upon assignment and loss before notice to the company, but the certificates issued thereunder were made payable to the assured or order, *Held*, That an assignment of the certificate, without notice, did not come within the provision.—*Id.*

#### MARRIAGE.

1. A statute of the State of New Hampshire in force in 1862 declared absolutely void a marriage where either party has a former wife or husband living, knowing such wife or husband to be alive. *Held*, That the word "former" as used in this connection means a continuing relation, and that the husband or wife must be such when the second marriage is solemn-



nized, and accordingly where one divorced for adultery in Massachusetts went over into New Hampshire and married that this marriage not prohibited in New Hampshire was valid everywhere.—*Roberts v. The O. & L. C. R.R. Co.*, 68.

2. A husband cannot allege, as a ground for annulling his marriage, that his wife made false representations to him whereby he was induced to marry her when he otherwise would not have done so, when, during cohabitation, he discovered the falsity of such representation but yet continued to cohabit with her for two years after such discovery.—*Muller v. Muller*, 287.
3. The provision of the statute of frauds requiring contracts which by their terms are not to be performed within one year from the making thereof to be in writing and signed by the parties has no application to mutual promises to marry.—*Brick v. Garnar*, 545.

See CONTRACT, 13; EVIDENCE, 5, 6.

#### MASONIC LODGES.

See LEASE, 24.

#### MASTER AND SERVANT.

1. Intestate was in the employ of defendant engaged in repairing the track. The construction train on which he was riding ran off the track at a crossing where mud had been thrown on the track by passing wheels and had frozen, filling up the rails, and was killed. One T., who was in charge of the train, was also general foreman of repairs and charged with the duty of seeing that crossings were properly cleaned and in safe condition, and this he had attempted to do. *Held*, That intestate in performing these services must be assumed to have understood the condition of the road and subjected himself to greater risks than he would have incurred under ordinary circumstances, and that T., in the duties he was performing at the time, was only a fellow-servant for whose negligence defendant was not liable.—*Brick v. The Roch., N. Y. & Pa. R.R. Co.*, 14.
2. M. was foreman of a pit in defendant's mine, and as such had power to hire and discharge men in that pit. A hole in the pit had been charged with rendrock and powder and fired, and upon examination it was supposed that the charge had exploded. M. ordered plaintiff to drill the hole deeper, in doing which the charge exploded and plaintiff was injured. M. was not shown incompetent, and plaintiff was a skilled workman. *Held*, That plaintiff could not recover; the business was a dangerous one, and plaintiff took the risks of the employment; the negligence, if any, of M. was that of a co-servant.—*Turner v. The Chateaugay Ore Co.*, 40.
3. As long as the master keeps the places where the servant is employed, or where he is likely to go in the course of that employment, safe, he discharges his whole duty in that regard. Accordingly, where an employee, at the instance of another employee and not in the course of his employment, went to a part of a vessel where he had no business or employment and was there injured by falling down an open hatchway, *Held*, that the master was not liable.—*Belford v. The Camden Shipping Co.*, 181.
4. A master is not obliged to furnish his workmen with best known or best conceivable appliances, but those which are reasonably safe and suitable for the work; such as the master, as a prudent man, would furnish if his own life were exposed to the dangers of the work.—*Burke v. Witherbee et al.*, 423.
5. The risk of injury from a defect in dangerous machinery, which defect adds to the danger and is negligently permitted by the employer to exist, is not such a risk as the servant is presumed to have assumed when he took the employment.—*Shaw v. Sheldon et al.*, 489.
6. In an action by the employee for wages, where the master pleads as a set-off that the employee misconducted himself in his employment by negligently and carelessly doing a specified thing, thereby exposing the master to liability, such defense cannot be sustained where it appears that an action is pending against the master for his employee's said act in which he has denied his liability therefor, and which action is not yet decided.—*Merlett v. The North & East River S.S. Co.*, 495.
7. The inspection of the roof of a chamber in an iron mine in which men are at work is the duty of the master, and he must employ persons for such inspection who are faithful and competent. And where a portion of the roof fell and killed an employee, although defendants regarded the inspection made sufficient, it is still a question for the jury whether it was so.—*McCall v. Witherbee et al.*, 530.

See NEGLIGENCE, 10, 21.

#### MECHANICS' LIENS.

1. A statement in a notice of lien that "60 days have not elapsed since the work was performed and materials furnished" is a sufficient compliance with the requirement of the Onondaga act that it shall state the date from which the lien is

claimed to have commenced, and especially so as against the owner, the contractor or his general assignee.—*Ryan v. Klock et al.*, 406.

### MERGER.

See COMMON CARRIERS, 5; MORTGAGE, 10.

### MISTAKE.

1. One B., who was owing plaintiff and defendants, delivered to the former goods under an agreement that the avails should be applied to plaintiff's claim and afterwards to defendants', and plaintiff paid to defendants the balance due them under the agreement. Thereafter one C. claimed and took away a portion of the goods. *Held*, That plaintiff could not recover from defendants for the portion so taken away without showing that it belonged to C. and that the title acquired from B. had failed.—*Snell v. Newell et al.*, 218.

### MORTGAGE.

1. A party claiming the benefit of the position of a purchaser in good faith and for a valuable consideration is bound to allege and prove that fact.—*Seymour v. McKinstry et al.*, 77.
2. Plaintiff sold certain premises to one S. under agreement by which he was to be paid the proceeds of a \$5,000 mortgage to be given on the premises, and a second mortgage of \$3,000 should be given to his wife. McK., with knowledge of this arrangement, took a \$5,000 mortgage, assigned it and paid part of the proceeds to S., retaining the balance to apply to claims against S. Plaintiff refused to receive the check for the part offered, demanded the whole \$5,000 of McK., which was refused, and afterward plaintiff drew the money on the check. In an action to declare the balance a prior lien on the premises, *Held*, That plaintiff was not estopped; that neither the receipt of the check by plaintiff, under the circumstances, nor the receipt of the second mortgage by his wife was a ratification of the transaction.—*Id.*
3. When a mortgage describes the property mortgaged as being situated easterly of a certain point when in fact it is situated westerly of said point, but also contains a further description of said property by a certain lot number on a map filed in the Register's office by which said property is accurately located, a purchaser at the sale on the foreclosure of the said mortgage acquires title to the property.—*Wagner v. Hodge et al.*, 125.
4. When a mortgagor has, subsequent to the execution of the mortgage, made an assignment for the benefit of his creditors, and his assignee, who has no other interest in the property than that derived under the assignment, is made a party to an action to foreclose the mortgage, individually and not as assignee, the judgment in such action will have the effect of cutting off his interest as assignee.—*Id.*
5. An assignee in bankruptcy of a mortgagor appointed under the late bankrupt laws subsequent to the commencement of an action for the foreclosure of the mortgage and the filing of a notice of the pendency of such action is a subsequent purchaser or incumbrancer and is not a necessary party to the action.—*Id.*
6. The complaint alleged that plaintiff allowed defendant P. to take notes belonging to her, to be secured by a mortgage given to him by the other defendants; that P. delivered them to the other defendants, who destroyed them, and asked to be adjudged owner of the mortgage to the extent of the notes. The referee allowed the complaint to be amended by striking out the allegation as to the destruction of the notes, they being produced. *Held*, No error; that the amendment did not affect the issue or bring in a new cause of action.—*Price v. Price et al.*, 194.
7. One of these notes was payable to plaintiff, and admissions of P. were shown to the effect that he received it from plaintiff to give to the other defendants. *Held*, That the legal and equitable title was shown to be in plaintiff, and that the mortgage was impressed with a trust in favor of plaintiff for the amount due her.—*Id.*
8. An objection that the property sold on foreclosure was not sufficiently described in the mortgage is not tenable when it appears that the premises could be definitely located by any competent person going upon the ground with the description.—*Abbott v. Curran et al.*, 231.
9. The summons was addressed to the heirs at law, etc., and their wives or husbands, if any. *Held*, That the words "if any" as used would not invalidate a summons otherwise perfect.—*Id.*
10. The mortgagor conveyed the premises to the mortgagee, the deed expressly declaring that it should not operate to merge the mortgage, but only to grant the equity of redemption. *Held*, That the intention that the deed should not operate as a merger should have effect.—*Id.*
11. A referee to sell was appointed by consent of all the parties who had appeared, who were all the parties but one, who was an absentee. *Held*, That if this was an

- error under Chap. 439, Laws of 1876, it did not render the appointment illegal or the sale void.—*Id.*
12. Letters of administration are conclusive evidence of the administrator's authority until revoked.—*Id.*
13. A recital in a deed that it was made "for commercial purposes only" imposes no restriction on the absolute title.—*Id.*
14. A mortgage conditioned for the payment of an annuity to the mortgagee during his lifetime, and also for the payment to him or the general guardian of the children of the mortgagor, for their benefit, a specified sum annually during their minority, creates a trust in favor of the children and constitutes the mortgagee a trustee of the mortgagor's children to the extent of their beneficial interest.—*McPherson v. Rollins et al.*, 254.
15. And when no power of revocation is reserved to the creator of the trust or conferred upon any other person, the mortgagee cannot, even with the consent of the mortgagor, give a valid discharge or certificate of satisfaction of the mortgage; and especially so in the absence of a consideration.—*Id.*
16. The record of such a mortgage is constructive notice of its provisions sufficient to put a purchaser upon inquiry, and of the want of power of such mortgagee to discharge the mortgage.—*Id.*
17. When an injunction pending foreclosure of a mortgage forbidding the mortgagor to collect the rents but allowing his agents to do so and retain them subject to the order of the court is vacated, the parties stand in the same position as though no injunction had been granted and the rents collected by the agents belong to the mortgagor.—*Wyckoff v. Scofield et al.*, 262.
18. The court has no power to order rents already collected and in possession of the mortgagor to be paid over and applied on the mortgage debt.—*Id.*
19. In an action of interpleader it appeared that plaintiff executed a mortgage to L. C., who was executrix of Z. C. L. C. having died, B. and S. were appointed administrators in her place and have possession of the mortgage, and claim that the consideration was derived from assets of the estate of Z. C. The mortgage was to L. C. individually. *Held*, That only the representative of L. C. could enforce the mortgage, and that the question whether she was guilty of a devastavit could not be determined in this action. The admission or denial of parts of the complaint "at" or "between" certain folios does not conform to the spirit of § 22 of the Code.—*Calkins v. Bolton et al.*, 333.
20. Under the facts appearing in the opinion, *Held*, That defendant is mortgagee in possession, and his rights are unaffected by foreclosure of subsequent mortgage.—*Wing v. Field*, 351.
21. A. gave a bond to his father, conditioned to pay him interest on a certain sum for his life, and then to his widow for her life, and at her death to pay the principal to the father's executor. The father having died, the obligor gave a mortgage to secure performance of the bond, and the obligee's wife died when a part of the interest due her was unpaid. *Held*, That the widow's administrator had a right to look to the mortgage for the unpaid interest, and the obligee's executor having declined to enforce the security, the administrator had a right to bring suit on the mortgage and join the executor as defendant. So far as the executor had paid the liens upon the mortgaged premises which it was the mortgagor's duty to pay, he was entitled to repayment out of the proceeds of the mortgage sale; but he was not entitled to such reimbursement for taxes paid on the whole premises, whereas the mortgage covered only an undivided half thereof.—*Weed v. Hornby et al.*, 355.
22. A mortgage for \$2,500 being in process of foreclosure, defendant applied to plaintiff's testator for a loan to pay it off. Testator paid the amount of the mortgage and costs and a sum to defendant, making \$3,000 in all, and took a mortgage for that amount and also an assignment of the prior mortgage. On foreclosure of the \$3,000 mortgage it was declared void for usury. On foreclosure of the prior mortgage, *Held*, That the court was justified in holding that the assignment was valid; that no payment of said mortgage is shown and that no usury having been pleaded it was not available as a defense.—*Allison et al. v. Schmitz*, 365.
23. A mortgage upon a leasehold estate which, by its terms, covers "the edifices, buildings, rights, members, privileges, and appurtenances thereunto belonging or in any wise appertaining; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity of the mortgagor, of, in, and to the demised premises and every part and parcel thereof with the appurtenances; and also the indenture of lease and every clause, article and condition therein expressed and contained," is a lien upon a right reserved in the lease to a renewal of the term for a further period of time, or, in default thereof, to payment from the owners of

- the property of the value of the buildings standing upon the property at the time of the expiration of the lease; and a suit to foreclose it can, therefore, be maintained after the expiration of the lease; and such effect is not defeated by a subsequent clause declaring that the mortgagee should have and hold the indenture of lease and the other premises granted, for and during all the rest, residue, and remainder of the term of years then to come and unexpired.—*Moller et al. v. Duryee et al.*, 458.
24. Payments upon the mortgage debt made by the executor of the deceased mortgagor after the assignment of the mortgaged lease will keep the debt alive and authorize a foreclosure of the mortgage as against such assignee after the time when the debt would have been barred by the statute of limitations if it had not been for such payments.—*Id.*
25. A purchaser of a leasehold interest in real property at a foreclosure sale thereof is entitled to have allowed him as cash upon such purchase the amount due for taxes, etc., upon such property when, by the terms of the lease purchased, such taxes were to be paid by the tenant.—*Moller et al. v. Duryee et al.*, 459.
26. The probability that an obligation upon the tenant to pay the taxes, etc., upon the property leased would accompany a lease for twenty-eight years is so strong as to require only formal evidence to sustain it as a fact in support of a motion based upon it.—*Id.*
27. Although the lease itself was not produced in the court below upon the argument of a motion based upon it, but its terms were proved by affidavit merely, still the court at General Term may receive and act upon the lease.—*Id.*
28. It is not waste for a tenant of nursery grounds, entering subsequent to a mortgage, to remove and sell in good faith and in the usual course of business growing nursery stock, if done before foreclosure is begun and not in apprehension of foreclosure and for the purpose of injuring the freehold and security.—*Hamilton v. Austin et al.*, 500.
29. Neither the receiver appointed in foreclosure, nor the mortgagee in a subsequent action at law, can recover such stock or its value.—*Id.*
30. A mortgage not accompanied by a bond, and which contains no covenant of payment is not usurious, even if it appear that it was drawn for a greater sum than the mortgagee intended to advance under it. Under such a mortgage the recovery will be limited to the advances proven.—*The First Nat'l B'k of Whitehall v. Griswold et al.*, 516.
31. Nor does it establish or affect the question of usury that the complaint claims for the whole sum secured by the mortgage.—*Id.*
32. Where, upon partition, the widow, whose dower had not been admeasured, released her dower and received therefor a bond and mortgage on a portion of the lands in suit in ignorance of a prior judgment against one of the mortgagors, *Held*, That her equities were the same as if she had conveyed lands and taken back a purchase-money mortgage, and that the mortgage was prior in lien to that of the judgment.—*Pope v. Mead*, 540.
33. Plaintiff's assignor held a mortgage on village lots 13, 14, 15 and 16. Defendant D. held three prior mortgages, the first two on lots 13, 14 and 15 and the third on lots 13, 14, 15 and 16. D. agreed with A. S., the owner of the equity of redemption, that she would foreclose the second of her mortgages and bid on the sale the amount due on all her mortgages, and A. S. agreed that she would pay the costs of foreclosure and redeem lots 13, 14 and 15 within a certain time. D. carried out her agreement and A. S. paid the costs, but failed to redeem. Plaintiff's assignor was a party to the foreclosure. *Held*, That by this arrangement the mortgage of plaintiff's assignor became a first lien on lot 16.—*Griswold v. Davey et al.*, 556.
34. By the payment of the costs by A. S. there was a small surplus on the sale resulting from D.'s bid. *Held*, That plaintiff was entitled to the benefit of this surplus.—*Id.*
- See AGENCY, 4; BANKS, 13; COUNTY TREASURER; DEEDS, 11, 12; DURESS, 1, 4; FRAUD, 3, 4; PLEADING, 16; RECEIVERS, 3, 5, 6.

#### MUNICIPAL CORPORATIONS.

1. A power to regulate the ringing of bells and the crying of goods or other commodities for sale at auction, or otherwise, relates solely to the manner of advertising a sale by public outcry, and authorizes the Common Council to regulate that custom or manner of advertising, but confers no authority to regulate or prohibit a sale of goods at auction within the store or building of the seller. Therefore, an ordinance prohibiting the sale of jewelers' goods at auction after sunset, under a penalty, is unauthorized and void.—*The City of Rochester v. Close*, 109.
2. While negligence cannot be assigned against a municipal corporation for the design or plan of an improvement, yet where it has constructed a street upon a high embankment without guards to protect its sides it is liable for injuries occasioned by the want of such protection

and cannot escape liability by the fact that the plan adopted did not call for guards.—*Hubbell v. The City of Yonkers*, 243.

8. While plaintiff was driving along such a street his horse became frightened at a bicycle, the driver lost control of him and the horse and wagon went over the embankment, thereby injuring plaintiff. *Held*, That defendant was liable, as the injury would not have occurred but for the defect in the street.—*Id.*
4. A city is liable for injuries resulting from the overturning of a load of hay caused by the runners of the sleigh sliding down the snow thrown up and along the sides of the street from the railroad track and striking the iron track, if it rendered the street unsafe and dangerous for travel and the city allowed it to remain so an unreasonable time.—*Hirsch v. The City of Buffalo*, 312.
5. Where one witness testifies that he pointed to another the place where the accident occurred, it is competent for the other to testify as to the condition of the street at that place before and at the time of the accident, although he was not then present.—*Id.*
6. Injury to the person occurred in January, 1877, and action was brought September 29, 1879. The Code took effect September 1, 1877, at which time the limitation was one year. *Held*, That the limitation of three years prescribed in § 883 governed, and the case was not within the exceptions embraced in § 414.—*Id.*
7. A municipal corporation is not released from responsibility for a defect in one of its sidewalks by the mere service of notice to repair on the adjoining owner. After notice of the defect it should cause it to be immediately repaired; or, if delay is necessary, close the walk against the public by a guard or barrier.—*Russell v. The Village of Canastota*, 317.
8. Defendant's charter requires that all claims against the city shall be presented to the common council, and that no action thereon shall be brought until 40 days after it shall have been so presented. *Held*, That a claim once rejected by the council need not be presented to the treasurer, either to entitle plaintiff to costs in a suit on said claim, or to notify defendant of the claim.—*Grier v. The City of Lockport*, 444.
9. A heavy counter belonging to a third person was tilted up against a house and allowed to remain upon a sidewalk of defendant for several days. It fell over and killed a child aged five. No one saw the accident, but there was evidence

showing that the child was playing on and about it at the time. On this point there was no rebutting evidence. *Held*, That plaintiff, the father, could not recover, as the act which injured the child was not shown to be the act of defendant.—*King v. The City of Troy*, 558.

10. The common council of defendant appoint its police commissioners and the latter appoint policemen. The commissioners are not amenable to the city and can only be removed by the Supreme Court. Accordingly *held*, That notice to a policeman of defendant of an obstruction in the street was not notice to defendant.—*Id.*

See NEGLIGENCE, 6, 12, 15.

### MURDER.

1. S., a woman living alone, was found in her house mortally wounded by a fracture of the skull produced by a blunt instrument. The object of the murder was plunder. In the kitchen was found a pie plate and crumbs of bread on the table. The defendant was shown to have lived near the deceased. He was arrested in a distant town for which he stated that he had set out on the day before the killing, while the truth was that he had left deceased's town about three in the morning of the day on which she was found dead. He admitted he had been in the house and had eaten bread and pie on the day before the body was discovered. His boot exactly fitted a frozen track near the part of the house where entrance was effected and he was shown to have been in possession of an axe about the time of the murder and thereafter, in spite of his denial. His story of his whereabouts on the evening of the day before the body was found was shown to be false and he was found in virtual possession of a tax receipt of the deceased. *Held*, That the facts warranted the verdict of murder in the second degree.—*The People v. Riley*, 76.
2. The guilt of a defendant must be established beyond *reasonable* doubt, not beyond a *possible* doubt.—*Id.*
3. Sections 46 and 226 *et seq.* of the Code of Crim. Proc., referring to the ordering of a Grand Jury, are intended as parts of a system of procedure and are entirely consistent and harmonious.—*The People v. Rugg*, 84.
4. It is not error for the Court on a trial for homicide to rule out the following preliminary question put to a proposed juror: "Suppose that when the prosecution closes its case the proofs at that point satisfy you that M. had been put to death by the defendant, would you still believe

him innocent of the murder, or would you then and thereafter believe him to be guilty of it?"—*Id.*

5. Confessions of a defendant voluntarily made are admissible.—*Id.*
6. It is not error to exclude the sworn statement of a witness made before a justice of the peace upon an inquiry into the cause of the death of the deceased, or to refuse to permit counsel to examine him on that statement.—*Id.*
7. It is not error in the judge to refuse to charge "If the jury are satisfied from the evidence that the larceny of the watch, etc., was committed after the murder there can be no conviction of murder in the first degree unless there is in addition affirmative proof on the part of the people that the murder was premeditated and also deliberate, and that the people must prove both premeditation and deliberation as clearly and as much to the satisfaction of the jury as they must prove the killing itself."—*Id.*
8. The jury in rendering the verdict "guilty" did not add the words "of murder in the first degree." *Held*, No error; especially as they had been charged to specify any other degree, if found, in their verdict.—*Id.*
9. The prisoner was much younger than his wife, for whose murder he was convicted. They lived on bad terms, and had been married eighteen months. The prisoner had beaten her and had fired a pistol at her on two occasions. He was a man of bad temper and occasionally drank to excess. On the morning of the murder he had taken two or three drinks of whiskey with a customer, but appeared rational. Soon after taking the drinks the deceased came into the bar-room of the saloon which they kept and the prisoner at once commenced to quarrel with her, struck her in the face and pushed her against a table. Her mother interfered and also the son of deceased, a boy. The prisoner knocked them both down. He then knocked the deceased down and kicked her until remonstrated with by a bystander. Thereupon he left deceased, walked around a corner of the saloon, a distance of eighteen feet, got behind the bar, took out a revolver, cocked it and fired a shot at the deceased from which she soon died. He showed no remorse, and did not seem much excited and not at all irrational. The jury found him guilty of murder in the first degree. *Held*, That the questions whether the verdict was supported by the evidence and of premeditation were rightly decided by the jury.—*Jones v. The People*, 111.
10. Where the court has charged the jury as to what constitutes insanity it is not

error to refuse to charge that if the jury find that defendant at the time the offense was committed was suffering from *delirium tremens* or any other species of insanity they must acquit.—*The People v. Mills*, 187.

11. A request to charge that if in consequence of some disease defendant had not sufficient use of his reason to control the passions which prompted the act the jury must acquit, is erroneous as excluding the question of his capacity to distinguish between right and wrong.—*Id.*
12. A refusal to charge that intoxication absolutely tends to show absence of premeditation and deliberation is correct.—*Id.*
18. If upon a trial for murder there is evidence, or inferences arising therefrom, which may bring the case within the crime of manslaughter, the question whether the crime was murder or manslaughter should be unequivocally submitted to the jury. Reading the sections defining manslaughter preceded by the remark that the court does not see their applicability to the case is error.—*The People v. Rego*, 276.

#### NEGLIGENCE.

1. Plaintiff, an aged lady, left the train at the wrong station; the station-master stopped the train, and the conductor called out to her to come on. She did so, and fell into a cattle guard, which was on the other side of the station from the highway, and was injured. *Held*, That under these circumstances the referee was justified in finding for plaintiff.—*Lawrence v. The D. & H. C. Co.*, 41.
2. In an action for damages to plaintiff's farm property caused by the spreading of a fire set by defendant it is error to exclude evidence offered by defendant to prove that there were woods so situated as to protect the fire from the wind and thus lessen the danger of its spreading.—*Kennally v. Selleck*, 72.
8. Evidence should, as a general rule, be confined to facts, and not include conclusions and opinions of the witness.—*Id.*
4. It is the duty of one who, in building a vault, is compelled to remove the sidewalk in a populous city and build a bridge over it, to so construct the bridge as to involve no peril to those passing over it, exercising due care; but he cannot be required to so construct it that it shall equal the sidewalk in safety and convenience, or that passers may cross with as little heed and care as upon the completed walk.—*Nolan v. King*, 88.
5. Snow and ice from time to time slid off the roof of a barn which stood at the

- edge of a sidewalk, and this caused an obstruction forty feet long and nearly three feet high, extending across the whole width of the sidewalk. This pile at both ends descended sharply. It had existed two weeks. It was rather difficult to get upon it and to get down from it. Plaintiff in the daytime passed over it, but, in descending, slipped, there being a light snow on the ground, and was injured. *Held*, That the question of contributory negligence was for the jury. —*Pomfrey v. The Village of Saratoga Springs*, 115.
6. A statute authorizing a tax for the "support of streets" imposes upon a corporation the duty of, and affords it the means for, keeping the sidewalks of such streets free from dangerous accumulations of snow and ice.—*Id.*
  7. An action cannot be maintained by personal representatives to recover damages for negligently causing the death of their intestate where the injuries causing the death were received in another state, in the absence of proof that any statute authorizing such an action existed in such state. Our statute has no extraterritorial effect —*Debevoise v. The N. Y., L. E & W. RR. Co.*, 138.
  8. In such an action it is not necessary for the answer to allege that the death occurred in another state or the non-existence in that state of a statute authorizing the action.—*Id.*
  9. If the surrounding facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, the inference of negligence is the only one left to be drawn and a nonsuit should be granted.—*Tolman v. The Syr., B. & N. Y. RR. Co.*, 148.
  10. Plaintiff's intestate was working upon a defective hand-car, the handle of which had been broken for two weeks to the knowledge of the foreman, a crowbar being used in place thereof, which acted irregularly on the walking beam, causing it to break, whereby intestate was precipitated from the car and killed. This happened while he and his co-servants were endeavoring to run the car to a distant switch to avoid an approaching train. Deceased had full knowledge of the defect, but made no complaint. *Held*, That by riding on the car and aiding in the use of the crowbar deceased took all risks of injury resulting from its use or the negligence of his fellow servants; that by his neglect to notify his master of the defect he was guilty of contributory negligence.—*Powers et al. v. The N. Y., L. E. & W. RR. Co.*, 158.
  11. In an action to recover for death alleged to have been caused by negligence, where the evidence of defendant's negligence and of plaintiff's freedom from contributory negligence are weak and inconclusive, and the facts imperfectly disclosed, but inferences are possible from them in favor of plaintiff, a nonsuit is improper. —*Fitzpatrick v. The N. Y., N. H. & H. RR. Co.*, 169.
  12. Plaintiff's intestate was drowned in a hole, near high-water mark on private grounds, caused by the discharge of sewerage from a discharge shoot built by defendant. It did not appear how the boy got into the hole, and there was no proof how long the hole had existed or that defendant's agents knew of it. *Held*, That defendant could not be charged with negligence under the circumstances.—*Murphy v. The City of Brooklyn*, 177.
  13. Everyone may use the seashore, between high and low water mark, for any lawful purpose, but he must use it as he finds it, and cannot look to anyone for any damages he sustains from any defects therein.—*Id.*
  14. Plaintiff's intestate was killed by being thrown from one of defendant's gravel cars, upon which he was employed to unload the gravel, by the backing of said car without notice being given to him. Upon the trial plaintiff offered to show "that there was negligence on the part of defendant in not having a proper system of warning the men employed on the train." This was objected to and the evidence excluded. *Held*, Error.—*Campbell v. The N. Y. C. & H. R. RR. Co.*, 245.
  15. In an action for injuries resulting from a defective sidewalk, the court charged the jury that they were to presume defendant knew of the defect if sufficient time had elapsed for it to gain that knowledge. *Held*, Error.—*Steffan v. The City of Buffalo*, 289.
  16. Whether admission of evidence of number and ages of plaintiff's children should be treated as error which might prejudice defendant and require the granting of a new trial, *quære*.—*Id.*
  17. Plaintiff, holding in her arms a large wash-stand, crossed a street in defendant village, not upon the crosswalk, and about dusk. *Held*, That it was not negligence as matter of law for plaintiff to cross at a point where there was no crosswalk, although there was a suitable crosswalk within twenty feet, and that the question whether it was negligence for plaintiff to cross with a piece of furniture in her

- arms, which might obstruct her view of the hole into which she fell, was one for the jury.—*Knight v. The President, etc., of the Village of Bath*, 301.
18. In an action for death caused by negligence, evidence that the children of deceased have no property is admissible, although they are of full age and reside away from his home; evidence that a daughter who resided at home had a disease which incapacitated her from working as if she were well is also admissible.—*Lockwood v. The N. Y., L. E. & W. R.R. Co.*, 322.
19. Where the husband of the plaintiff is a cripple and has been supported by her for years from the avails of a farm which she owns and cares for, and by her work for others, she is entitled in an action for damages for injuries sustained through defendant's negligence to recover her loss by reason of inability to labor and care for her property and for expenses necessarily incurred by reason of the injuries. In such a case \$1,000 held not to be excessive.—*Fitzsimons v. The City of Rome*, 348.
20. Chap. 122, Laws of 1876, has no application to productive industries or useful or necessary business or occupation. A business or vocation to be within that act must be an employment either vicious in itself or which partakes of the character of an amusement.—*Hickey v. Taaffe*, 442.
21. Plaintiff was an employee of defendant and was injured through the breaking of a wooden stake used to keep in place a carload of lumber in course of transportation. *Held*, Under the circumstances, that plaintiff made out a case for the jury.—*Bushby v. The N. Y., L. E. & W. R.R. Co.*, 453.
22. A cause of action under the statute of 1847 to recover damages for the death of a person resulting from injuries caused by the negligence of another, where no injury to the estate or property of the deceased is claimed, abates by the death of the wrong-doer.—*Hegerich v. Keddie*, 468.
23. Live coals fell from one of defendant's engines upon the back of a horse, which thereupon became unmanageable. The driver attempted to drive him against the curbstone to check his speed, but the wagon was overturned, the driver thrown out and plaintiff was run over and injured. *Held*, That the proximate cause of plaintiff's injuries was the wrongful act of defendant and it was liable therefor.—*Lowery v. The Manhattan R. Co.*, 476.
24. Deceased was riding in a wagon with her husband from the north; defendant's tracks crossed the highway east and west; of these there were four—two freight, two passenger; the most northerly tracks were for freight; these were four feet and a half lower than the passenger tracks; between the two sets of tracks was an open space seventy feet wide, and from the freight tracks the passenger tracks could be seen for a mile. When deceased approached the railroad a freight train going west was passing. This shut off the view towards the west. The husband waited until the freight train passed, and at once drove over the freight tracks and over the intervening space, and upon reaching the southern passenger track the wagon was struck by an express train, not ringing its bell, and the occupants were killed. The court nonsuited plaintiff upon the ground that there was no evidence that the deceased had not been guilty of contributory negligence. *Held*, That the nonsuit was proper.—*Hoag v. The N. Y. C. & H. R. R.R. Co.*, 506.
25. Plaintiff, who was in defendant's employ, was directed to disconnect a belt and hang it up for repairs, a feat which he had often done before. He found the ladder in position, looked to see if it was all right, ascended and endeavored to seize the belt, which was revolving rapidly, became unconscious, and was found on the floor with his arm torn out and the ladder broken. No one saw the accident. *Held*, That it could not be said as matter of law that he was guilty of such negligence as to bar a recovery; that the question was one for the jury.—*Cahill v. Hilton et al.*, 541.
26. Evidence sufficient to make a case for the jury on the question of negligence.—*Pendergast v. The Johnston Harvester Co.*, 555.
- See COMMON CARRIERS, 1, 2; ESTOPPEL, 1; EVIDENCE, 15; HIGHWAYS, 1-3; LEASE, 10-13, 16, 17; LIMITATION, 2, 5; MASTER AND SERVANT, 1-5, 7; MUNICIPAL CORPORATIONS, 2-4, 6, 7, 9, 10; RAILROADS, 9, 11, 13, 17, 19-24.

#### NEGOTIABLE PAPER.

1. Where an endorser of a promissory note has had the same discounted, and thereafter upon the request of the maker and a prior endorser, made before maturity, and upon their promise to give him a new note therefor, takes the old note up when it falls due and before protest, as he claims, to save their credit. *Held*, That the obligation primarily incurred by him was a contingent one, which did not prevent such an express contract, and to sustain it it is enough that at the request of the prior endorser something was done which originally the last endorser had



not undertaken to do.—*Wyckoff v. De Graff*, 13.

2. An oral agreement made at or before the time of indorsement and delivery of a promissory note is not competent to modify the import of the indorsement.—*The Discount & Deposit Bk. v. Oosterhoudt et al.*, 25.

3. A demand of payment by letter is insufficient to charge an endorser on a promissory note; he can only be charged by demand made at the time and place indicated by the note.—*Parker et al. v. Stroud et al.*, 196.

4. The holder of a note payable on demand is not chargeable with neglect for omitting to make a demand within any particular time.—*Id.*

5. It is competent to show that a surety signed a promissory note upon condition that the payee of the note should furnish the principal maker with work to pay the note and that as fast as the money was earned it should be endorsed on the note. *Robinson v. Mernaugh et al.*, 311.

6. In an action brought to enforce the liability of defendant as the acceptor of a draft or bill of exchange drawn upon him when the answer, without either generally or specifically denying the acceptance of the draft, admits the acceptance of a draft similar to the one set forth in the complaint, but alleges that it was without consideration, such acceptance need not be proved by plaintiff.—*The Melville Mfg. Co. v. Salter*, 355.

7. Where the holder of a joint and several promissory note on parting with it adds his signature to those of the makers without any restriction he becomes severally liable to pay the sum named according to the terms of the writing; especially so as to a *bona fide* purchaser.—*Denick v. Hubbard*, 368.

8. An antedated note is well pleaded if alleged to have been made on the day of its date.—*Id.*

9. Where, in an action on a promissory note, a witness gives an opinion adverse to its genuineness, a question calling for a comparison of the note in suit with a genuine note by the witness and for a statement of the difference he discovers in the signatures is proper, and a refusal to allow it is error.—*Winne v. Tousley*, 397.

10. The assignor was a member of a firm which formed a partnership with another firm and later a corporation was organized which assumed the debts of the partnership. Certain notes of the corporation being due to a bank which was

pressing for payment, an arrangement was made by which the assignor and his original partners gave their joint and several promissory notes for the debt and the security held therefor was transferred to them. *Held*, That a claim on the notes was properly allowed as a separate debt of the assignor; that the bank dealt with the makers as individuals and not as a firm and that there was sufficient consideration for the note.—*In re accounting of Waldron*, 417.

11. An instrument in writing by which the maker promises to pay a specified sum at his death is a promissory note, although it is payable to a named payee, and therefore not negotiable.—*Blackman v. Cavin*, 445.

12. P., the owner of a note in respect to which defendants, although makers were in fact sureties, gave the same to an attorney for collection, the note being past due. The attorney gave it to a bank, also for collection, which sent the note to a correspondent bank endorsed for collection. Plaintiff, at the request of one of the makers and the principal debtor upon the note, directed the latter bank to charge it to his account, which was done and the proceeds remitted and paid to P. In an action on the note, *Held*, That the transaction was a sale of the note to plaintiff, and that defendants could safely pay it to plaintiff as holder.—*Coykendall v. Constable et al.*, 504.

See AGENCY, 2; SURETYSHIP, 4, 5.

#### NEW TRIAL.

See APPEAL, 11, 19, 21, 22; JURORS, 2, 3; PRACTICE, 1, 5, 6, 80.

#### N. Y. CITY.

1. Plaintiff, who was the chief clerk of the Bureau of City Revenue in the Finance Department of the City of N. Y., was appointed by the Board of Education of said city instructor in the evening high school in economics and political science, with special reference to the duty of citizenship in N. Y. City. *Held*, That he was prevented by § 59 of the Consolidation Act of 1882 from collecting payment from the city for the services performed as such instructor.—*McAdam v. The Mayor, &c. of N. Y.*, 494.

2. Plaintiff was a clerk in the Fire Dep't of N. Y. The commissioners made an order relieving him from duty as clerk and continuing him as messenger at a lower salary, which he received receipting in full. He continued to perform duties of a similar character and at the same place as before. *Held*, That the order simply accomplished a reduction of salary, which

the commissioners had power to make.—*Morris v. The Mayor, &c., of N. Y.*, 517.

See ASSIGNMENT FOR CREDITORS, 3; OFFICE; POLICE; TAXES, 10, 11.

### NURSERIES.

See MORTGAGE, 28, 29.

### OFFICE.

1. The word "term" as used in § 25 of Chap. 335, Laws of 1873, is intended to designate consecutive periods of six years following each other in regular order. The term of office of one appointed during such period expires with the expiration of that period.—*The People ex rel. Mason v. McClave*, 449.
2. It was the intention of the legislature that the sole power of appointment conferred upon the Mayor of New York by Chap. 43 of the Laws of 1884, should be exercised only by a mayor subsequently elected.—*The People ex rel. Wood v. Lacombe*, 450.
3. The interpretation of statutes is to be controlled by the intention of the legislature, which is to be ascertained from the cause or necessity of the enactment as well as other circumstances. A case which is within such intention is within the statute, although by a technical interpretation not within its letter.—*Id.*

### PARTIES.

1. In an action under Chap. 161, Laws of 1872, against the Board of Supervisors and the town auditors to set aside certain audits, the persons in whose favor the audits were made are necessary parties.—*Osterhoudt et al. v. The Board of Supervisors of Ulster Co.*, 829.
2. Although under §§ 452, 499 of the Code an omission to object to a defect of parties by demurrer or answer is a waiver of objection to the granting of relief on that ground, yet where the relief granted against a defendant would prejudice the rights of others whose rights cannot be saved by the judgment, and without whose presence the controversy cannot be completely determined, the court must direct them to be made parties before proceeding to judgment.—*Id.*
3. Section 756 of the Code of Civil Procedure confers upon the court a very broad discretion to bring in a party who may have an interest in the suit; and, under such section, it is within the discretion of the court upon motion of either party to substitute as plaintiff the sole transferee *pendente lite* of the plaintiff's cause of ac-

tion.—*De Bost v. The Albert Palmer Co.*, 369.

See ATTACHMENT, 9; CORPORATIONS, 23; MARINE INSURANCE, 2; MORTGAGE, 5; PLEADING, 15; RECEIVERS, 6, 7.

### PARTITION.

1. After the purchaser on a sale in partition paid the purchase money and received the deed he presented a bill for the taxes of 1883 to the referee and asked its payment, which was refused because the land was assessed to "The estate of Jacob D. Odell." The assessment was made under the charter of Yonkers, which provided, "For the valid assessment of any land it shall be sufficient to give the name of the owner when known, the lot number if any on any designated map, the size thereof as near as can be ascertained and the assessed value. An error in the name of the owner shall not invalidate the assessment." *Held*, That the tax was a lien on the premises and should have been paid and discharged by the referee under § 1676 of the Code of Civil Procedure. That it was not the duty of the referee to pay the same out of the purchase money before compelling the purchaser to take title.—*Odell v. Odell*, 90.
2. Where, in an action for partition, a mortgagee of the premises by answer sets up his mortgage and its foreclosure, and submits his rights to the court and takes part in the trial, he cannot on appeal successfully contend that the court had nothing to do with the validity of his mortgage.—*Barnard et al. v. Onderdonk*, 155.
3. A judgment of foreclosure is deemed paid after the lapse of twenty years.—*Id.*

### PARTNERSHIP.

1. In an action for partnership accounting where such co-partnership is denied, oral evidence is admissible to show that the articles of copartnership were not intended to operate as a contract between the parties, but were made for the purpose of defrauding plaintiff's creditors.—*Marsh v. Pierce*, 51.
2. C. & H. became special partners with S. & P. in a firm which had previously been composed of the latter alone, upon the agreement that S. & P. would assume and pay all the existing indebtedness of the old firm. S. & P. failed to perform this agreement, but used the capital contributed by C. & H. to the new firm to discharge the indebtedness of the old firm. The new firm subsequently failed in business and compromised with its creditors, and thereafter C. & H. brought an action to recover the amount of capital contributed by them, less the amounts which

they had drawn from the firm, as damages for the breach of the above-mentioned agreement. *Held*, That in the absence of any evidence showing that the failure of the new firm was the result of the misappropriation of the capital contributed by the plaintiffs the action could not be maintained.—*Childs et al. v. Seabury*, 284.

See ASSIGNMENT FOR CREDITORS, 1; CONTRACT, 8, 16, 17; CONVERSION, 9; DEPOSITIONS, 1.

#### PARTY WALL.

1. A covenant to contribute to the construction of a party wall when he shall use the same, entered into by an owner of land, for himself, his heirs and assigns, does not run with the land, and is not enforceable against a subsequent grantee of the land, though his deed be by its terms subject to the covenant.—*Weeks v. McMillan*, 158.
2. Such grantee, using the wall upon his premises, is not liable in trespass, though he took with knowledge of the agreement and of the fact that the payment had not been made.—*Id.*

#### PENAL CODE.

See CRIMINAL LAW, 4; LOTTERY.

#### PENSION.

See EXECUTION, 6.

#### PERJURY.

1. A civil action does not lie against one who, while a witness in a civil trial in which the plaintiff was a party, testified falsely. The witness must be left to the criminal law.—*Jones v. McCaddin*, 53.

#### PLEADING.

1. Actions for false imprisonment and for malicious prosecution, being for personal injuries, may be contained in the same complaint.—*Marks v. Townsend et al.*, 10.
2. Each denial of separate allegations of the complaint is a separate defense, and as such may be stricken out in a proper case.—*Shearman et al. v. Boehm et al.*, 66.
3. Where it uncontradictedly appears that defendant must have personal knowledge of the allegations denied by him "on information," such denial may be stricken out as sham.—*Id.*
4. A party is not required to state in his answer the theory of law upon which his defense is based, but only to state the facts, and if they are so stated as to en-

able the court to see that they constitute a defense the pleading is not demurrable because their legal effect is not stated, or even because the proper form of relief is not demanded.—*Hemingway v. Foucher*, 166.

5. When it does not appear by the complaint in an action that defendant was not, at the time of the commencement of the action, a resident of the State, and had no property and had not been served with a summons in the State, such facts may be relied upon as a defense by way of answer; and an answer setting up such a defense, subscribed by an attorney as "attorney for the defendant," is not a general appearance in the action.—*Hamburger et al. v. Baker*, 218.
6. Under the rules of pleading established by the Code of Civil Procedure, the defense of want of jurisdiction is not waived by setting up other defenses in the answer.—*Id.*
7. A complaint which alleges that one A. died abroad, leaving B. and others her sole heirs and next of kin; that B. gave to defendant a power of attorney to collect her share of the estate; that thereupon defendant was appointed administrator of A.'s estate, collected it and converted the same to his own use; that B. has since died, and that plaintiff was appointed administrator of her estate, states facts sufficient to constitute a cause of action for the wrongful appropriation of the fund.—*Marshall v. Bresler*, 216.
8. The remedy for defective verification of a complaint is not by motion to compel a verification, but by treating it as a nullity.—*Ralph v. Husson*, 240.
9. In an action against the sheriff of N. Y., Co. the complaint alleged: "That on or about the 22d day of April, 1882, defendant, as sheriff of the City and County of New York, took from plaintiffs a large quantity of goods and chattels, consisting of one hundred and thirteen cases of hats, owned by and the property of plaintiffs, of the value of \$1,891.22, and wrongfully detains the same, to the damage of the plaintiffs \$2,000." *Held*, That facts sufficient to constitute a cause of action were stated.—*Moses et al. v. Bowe*, 251.
10. Where an answer sets up as a defense an attachment and the attachment was subsequently vacated, *Held*, That a motion to strike out the averments as to the attachment as sham was improper.—*Douglas v. Stockwell*, 256.
11. The creditor who procured the vacated attachment subsequently obtained a new attachment. Upon a motion for leave to serve a supplemental answer, and to set up, among other things, this last attach-

- ment, and also an attachment in favor of another creditor, *Held*, That the motion was properly granted.—*Id*.
12. An order or stipulation extending the time to answer the complaint implies an admission that it is sufficient in form to require an answer, and is a waiver of the right to move to make more definite and certain or to require the plaintiff to separately state and number the several causes of action alleged, unless the right is expressly reserved.—*Brooks v. Hanchett*, 267.
  13. A plaintiff will not be allowed to amend his complaint by setting up facts of which he had knowledge at the time of the commencement of the action.—*Muller v. Muller*, 287.
  14. The court will not, as a general thing, undertake to determine upon an application for leave to amend a pleading whether the proposed amendment can be finally substantiated by proof or not; but when it is made to appear without contradiction that the amendment cannot be sustained by evidence it should not be permitted to be made.—*Id*.
  15. The complaint alleged that one M. was, in his lifetime, the owner of 49,940 shares of the stock of a certain corporation; that by his will he directed his property to be divided as provided by the laws of the State of N. Y. in cases of intestacy; that plaintiffs were his next of kin, and as such entitled to a share of his estate; that after his death defendants were each found to be possessed of a certificate of the said stock representing in the aggregate thirty-two thousand shares, which they claimed to have received from the testator before his decease; that plaintiffs had no knowledge or information sufficient to form a belief as to whether defendants became possessed of said certificates before or after his decease, but that if they acquired them prior thereto it must have been by undue influence, and demanded judgment in effect that the shares so held by defendants should be divided among the next of kin, as provided by the will. *Held*, That the complaint presented no cause of action and that there was a misjoinder of plaintiffs and defendants, and that separate actions should have been brought.—*De Caumont v. Morgan et al.*, 357.
  16. A complaint set up the making of a mortgage on lands in another State; an assignment thereof to plaintiff's testator; a sale of the mortgaged premises to defendant and the assumption by him of the mortgage; the foreclosure of the mortgage in a court of general jurisdiction of the State where the premises were situated, and the due recovery of a judgment against defendant on his covenant to pay. *Held*, That the complaint set up only a cause of action on the judgment.—*Krower et al. v. Reynolds*, 466.
  17. In an action upon covenant it is necessary to allege a breach.—*Id*.
  18. In an action against an agent for insurance premiums not returned to the company the answer alleged as a counterclaim a malicious arrest under an order of the court, slander, with special damage, and the purloining of defendant's account-books, which caused him injury. *Held*, That these defenses were not admissible under Code, § 501, Subd. 1.—*The Union Ins. Co. v. Vandercook*, 506.
  19. In an action by the vendee to recover money paid by him on a contract for the purchase and sale of real estate, the vendor may plead proper facts and pray for a specific performance of the contract, and this will constitute a counterclaim under § 501, Code, which counterclaim may, after dismissal of the complaint, be sent to the equity term for trial.—*Moser v. Cochrane*, 545.
- See APPEAL, 10; ASSOCIATIONS; ATTACHMENT, 14; CIVIL DAMAGE ACT, 3, 4; EXECUTORS, 1; GUARDIAN, 8; LEASE, 19; LIBEL, 8; LUNATICS; MALICIOUS PROSECUTION, 6; MARRIAGE, 2; MORTGAGE, 6, 19; NEGLIGENCE, 8; NEGOTIABLE PAPER, 8; SURROGATES, 2, 8.
- ### PLEDGE.
- See STOCKS, 1-3, 5.
- ### POLICE.
1. The fact that the Commissioner before whom the evidence was taken was no longer a member of the Board when action was taken thereupon and the accused officer dismissed does not render such dismissal illegal. It is sufficient that the evidence was legally taken and was examined by all the members of the Board.—*The People ex rel. McCarthy v. Police Comrs*, 161.
  2. It is sufficient to conclude the appellate courts that the Commissioners had some evidence upon which they could base their decision.—*Id*.
  3. Where the testimony on charges against a police officer have been taken before only one commissioner it is sufficient to answer the requirement of Rule 131 of the Police Dept. that the evidence is laid before and examined by the several commissioners constituting the board at a regular meeting, even though only a quorum be present.—*The People ex rel. Swift v. Police Comrs.*, 503.

## PRACTICE.

1. A new trial, on the ground of newly discovered evidence, must be denied after the judgment has been affirmed on appeal.—*Fisher v. Corwin*, 7.
2. Where no objections are taken at the trial to directions sending the exceptions to General Term in the first instance, it is too late to object in the Court of Appeals that the case was not a proper one to be heard at General Term in the first instance.—*Wyckoff v. De Graff*, 18.
3. When the court, on a motion made upon the pleading at the trial, dismisses one cause of action stated in the complaint, and directs a verdict for another which is admitted, and plaintiff's counsel takes no exception to this disposition of the case, but acquiesces therein, the judgment cannot be reversed upon appeal, although considered erroneous by the appellate court.—*Henry et al. v. Dunning*, 21.
4. The court, upon the trial of an action before a jury, has no right to refuse to accept a request to charge made after the conclusion of its charge to the jury upon the ground that counsel had already, before the commencement of the charge, presented such requests, and a refusal to accept such request is a fatal error.—*Pfeffe v. The Second Ave. R.R. Co.*, 50.
5. In an equity action a new trial will not be granted for errors in the admission or exclusion of evidence if the case has been rightly decided upon sufficient and competent evidence.—*Marsh v. Pierce*, 51.
6. Where questions other than those embraced in the issue were referred to a referee and were passed on in his report, and judgment has been entered thereon, *Held*, that a motion for new trial was properly made at General Term in first instance.—*Moore et al. v. Oriatt*, 68.
7. Where on the trial of issues of fact in an equity action improper evidence is received under objection, and on the trial at Special Term before another judge a case containing such evidence is offered and received without objection, *Held*, That the right to object to the evidence on appeal was waived.—*Arnold v. Parmelee et al.*, 70.
8. In charging the jury, it is competent for a judge to assume a fact for the purpose of illustrating a point or to state what is conceded, claimed or denied by counsel during the progress of a trial.—*The People v. Rugg*, 84.
9. Any objectionable statement concerning the facts in issue by a judge in his charge is fully cured by a plain statement thereafter that the jury are left as the sole judges of all the facts or equivalent words.—*Id.*
10. An exception to the refusal of the court to submit to the jury any other question than the amount of plaintiff's recovery is not equivalent to a request to submit to them a particular question for their consideration. In order to take advantage of an error of the court in failing to submit a particular question to the jury there should be a distinct request that such question be submitted to them as one of fact for them to consider.—*Manning v. Case*, 108.
11. At the time of the commencement of the action the plaintiff was a minor, but she became of age prior to the trial thereof. No guardian was ever appointed. *Held*, That such omission did not affect the jurisdiction of the court; that such omission at the time of the commencement of the action was an irregularity merely, which was waived by defendant's pleading to the merits, and that when plaintiff obtained her majority the necessity for a guardian had ceased to exist.—*Simis v. The N. Y. College of Dentistry*, 129.
12. When a notice of motion contains a clause stating that, in addition to the relief specified, "such other and further relief as to the court shall seem just" will be applied for, relief may be awarded to such an extent as is warranted by the facts plainly appearing in the papers on both sides.—*In re petition of the N. Y. Elevated R.R. Co.*, 146.
13. An erroneous admission of incompetent evidence is cured by a direction to the jury to strike it entirely out of their consideration.—*The Geneva, I. & S. R.R. Co., v. Sage*, 167.
14. It is not necessary to file a new note of issue and serve a new notice of trial after the service of a supplemental complaint.—*Lovatt v. Watson et al.*, 198.
15. Where the case on appeal does not show that it contains all the evidence bearing on the finding sought to be reviewed the court will assume that the evidence was sufficient to sustain the finding.—*Porter et al. v. Smith et al.*, 210.
16. An exception to a finding of fact or to a refusal to find as requested is not authorized.—*Id.*
17. Counsel handed up to the court numerous written requests to charge. After the charge counsel said: "I desire to call your honor's attention to certain propositions embodied in the written requests to charge which I have submitted to —." At this point the court interfered, saying:

- "I decline to charge further than I have already," and an exception was taken. *Held, Error.*—*De Bost v. The Albert Palmer Co.*, 228.
18. Whether a party should be compelled to elect to proceed upon one of two causes of action stated in the complaint rests in the discretion of the court, where it has such power.—*Seymour v. Lorillard*, 288.
19. A cause of action for false representations and a cause of action for breach of warranty, both concerning the same matters, are separate and independent though under the allegations of the complaint containing them but one recovery can be had. In this case the court refused to compel the plaintiff to elect which of the above actions he would proceed upon.—*Id.*
20. To cure the error of admitting illegal evidence upon a trial, the evidence should be stricken out and the jury distinctly instructed to disregard it.—*Alexander v. Osborn*, 298.
21. The cause of action stated in the complaint determines the rights of the parties to a jury trial, and such right cannot be defeated by the form of the answer interposed.—*Zoller v. Groht et al.*, 325.
22. The question of the right to a jury trial can be raised upon an appeal from the judgment rendered in the action by an exception taken to the refusal of the court to grant such trial upon a demand made for the same before any evidence was taken in the case, and the right to raise such question is not lost by defendant by proceeding with the trial of the case after such refusal and cross-examining plaintiff's witnesses.—*Id.*
23. When during the trial of an action in the Supreme Court a stipulation is entered into between the parties for the discontinuance of two actions in another court between the same parties and for the cancellation of a judgment entered in one of them, and such stipulation is entered in the minutes of the proceedings, and is also embodied in writing and signed by the counsel, and this writing is subsequently lost, an action may be maintained in the Supreme Court to establish its existence, and such remedy is concurrent with that by motion in the other court for a discontinuance of the action pending therein.—*Deen v. Milne*, 359.
24. When a case is settled and filed after entry of judgment, the Judge, Court or Referee should order it annexed to the judgment roll.—*Cornish v. Graff*, 383.
25. It is the duty of counsel to remain in or be represented in court until the jury is discharged, and they cannot, by withdrawing from court, deprive the court of its power to recall and reinstruct the jury. A failure by the court, in such a case, to send for counsel before reinstructing the jury is not error.—*Id.*
26. When a question of fact is sought to be reviewed the case should state that it contains all the evidence or all bearing on that question of fact; otherwise, the court will assume that the evidence was sufficient to sustain the finding of fact.—*Griffiths et al. v. Phelps*, 390.
27. In an action on a promissory note defendant put in evidence letters written by plaintiff and asked a direction for judgment "in view of these letters," which was denied. *Held*, That if he relied on the ground that the letters showed the note to be without consideration he should have called the attention of the court to that point.—*Langley v. Wadsworth*, 419.
28. So far as the cross-examination of a witness relates to facts in issue or relevant facts it may be pursued as matter of right; but when its object is to test the accuracy or credibility of the witness its method and duration are subject to the discretion of the court.—*Id.*
29. A witness cannot be cross-examined as to any fact which, if admitted, would be collateral or irrelevant, and which would in no way affect his credit.—*Id.*
30. A new trial should not be granted where upon the pleadings and the facts as found it appears that there is a good defense.—*Graham v. Meyer*, 424.
31. Where after the jury has retired to deliberate counsel desire to take exceptions to the charge the court has the right to and it is proper practice for him to recall the jury and hear the exceptions in their presence.—*Petrie v. The O. & L. C. R.R. Co.*, 436.
32. In an action on contract in the District Court of New York City an order of arrest was obtained on extrinsic facts. Defendant appeared and admitted the claim, interposing no sworn answer to the verified complaint. Plaintiff's motion for judgment was denied and an adjournment allowed defendant to enable him to vacate the order of arrest, which motion to vacate was granted and judgment in plaintiff's favor entered within eight days from the return day. *Held*, on appeal by plaintiff, no error.—*Adler et al. v. Kerner*, 484.
33. In case of the submission of a controversy without action, under the Code, the court is confined to the facts agreed on, and can make no inferences, or in any

way depart from or go beyond the statement presented.—*Crosby v. Thedford*, 544.

As to practice on appeal, see APPEAL, 2-4, 8, 15, 16, 21-23.

As to practice in criminal cases, see CRIMINAL LAW, 1; JURORS; MURDER, 3, 6-8, 10-13.

As to practice on foreclosure, see MORTGAGE, 11.

As to practice in different classes of cases, see those titles, as COMMON CARRIERS, 3; CONTEMPT, 3; CONVERSION, 4, 9; MALICIOUS PROSECUTION, 4, 5, 9; NEGOTIABLE PAPER, 9; SLANDER, 2; SUPPLEMENTARY PROCEEDINGS, 4.

See also, APPEAL, 1, 5, 6, 9, 13; ARREST, 3, 6; ATTORNEYS, 6; BANKS, 5; BILL OF PARTICULARS; CHILDREN, 2, 3; COSTS, 4; EVIDENCE, 7; EXECUTION, 1; FRAUD, 6, 7; HIGHWAYS, 2; HUSBAND AND WIFE, 1, 2; INDEMNITY, 3; NEGLIGENCE, 2, 5, 9, 11, 14-17, 24-26; PARTIES, 2; PLEADING, 2, 3, 10, 11, 13, 14; RAILROADS, 17, 22-24; REFERENCE, 1, 2.

#### PRINCIPAL AND AGENT.

See AGENCY.

#### PRINCIPAL AND SURETY.

See SURETYSHIP.

#### PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 12; SLANDER, 2-4.

#### PROHIBITION.

See SURROGATES, 6.

#### PROMISE.

1. A promise not to disclose another's intended bid at an auction confided to the promisor does not create an obligation that the law will enforce, and no action lies for alleged damages due to a violation of such confidence.—*Jones v. McCaddin*, 53.

See CONTRACT, 16, 17; FRAUD, 8; SPECIFIC PERFORMANCE, 1, 2.

#### PROMISSORY NOTES.

See NEGOTIABLE PAPER, 1-5, 7-9, 11; PRACTICE, 27.

#### PUBLICATION.

1. What publication should be given to the appointments of the terms of court is

fixed by the legislature, and this court cannot enlarge the terms of the statute.—*The People ex rel. Cole v. Hill*, 529.

See SERVICE.

#### RAILROADS.

1. Where a railroad corporation relies upon a release from damages resulting from the negligence of its employees contained in a pass the conditions of the pass must be established affirmatively.—*McElwain v. The Erie R. Co.*, 21.
2. An agent of a railroad company, when testifying in its behalf, is within the rule requiring the credibility of interested witnesses to be submitted to the jury.—*Id.*
3. A railroad pass contained this provision: "The acceptance of this pass is to be considered a waiver of all claims against the Erie Railway Company for personal damages and injuries received when on the above train." *Held*, Not to release the company from the results of its employees' negligence.—*Id.*
4. A certified copy of the articles of association of a railroad company, showing that some of the requisite twenty-five names were subscribed by persons other than those bearing the names so signed, *Held*, to be *prima facie* evidence that the names subscribed were genuine, and that the signatures were authorized.—*In re petition N. Y. L. & W. RR Co. v. The Union Steamboat Co.*, 29.
5. It is sufficient in that respect if the articles of association state the length of the road approximately.—*Id.*
6. A street railway company does not possess the exclusive right of way in the streets of a city in the sense that he is a trespasser who undertakes to use its tracks at all, so that the company may hunt him out of the way *ad libitum*.—*Fleckenstein v. The Dry Dock, E. B. & B. RR. Co.*, 128.
7. The railway has the paramount right to move through the street on its tracks, but truckmen have the right to drive across or upon the same and to make general use of the same so long as they do not obstruct the passage of the cars.—*Id.*
8. What is to be deemed such an *obstruction* is a question dependent on the particular circumstances of each case as it arises.—*Id.*
9. Where action is brought to recover damages from a fire caused by sparks from defendant's locomotive, it is sufficient to make a *prima facie* case of negligence to

show that at the time of the accident the engine emitted a large and unusual quantity of sparks.—*Ruppel v. The Manhattan R. Co.*, 149.

10. Certain railroads having refused to allow petitioner to cross their tracks, commissioners were appointed who decided in favor of the petitioner and awarded \$1 damages. No evidence was offered as to any pecuniary injury, or as to the pecuniary value of the right to cross. *Held*, That it could not, under the circumstances, be said as matter of law that the damages awarded were inadequate, and that the order imposing the costs of litigation on the opposing roads was discretionary and could not be reviewed.—*In re application of the C. & H. Horse RR. Co.*, 165.
11. Plaintiff's intestate took passage at a way station on a train composed of excursion cars, and not finding any seat stood on the platform, no objection being made to his doing so. While the train was going around a curve at a high rate of speed he was thrown off into the air and killed. There was no proof whether or not he was holding on to anything at the time. *Held*, That the jury was warranted in finding defendant guilty of negligence, and that nothing was proved from which as a question of law the court could attribute contributory negligence to deceased.—*Werte v. The L. I. RR. Co.*, 221.
12. The sale of seats by a company for a certain train binds it to furnish a safe and secure place for its passengers to ride and comfortable accommodations for their convenience.—*Id.*
13. When defendant's train stopped at plaintiff's destination the platform of the car plaintiff was in stopped in the middle of a street. There was nothing to direct passengers to alight from one side rather than from the other; but there was a branch track running along one side. Plaintiff alighted on the latter side, and was injured by a train running on the side track. *Held*, That a verdict in plaintiff's favor for his injuries should be sustained.—*Van Ostran v. The N. Y. C. & H. R. RR. Co.*, 302.
14. Plaintiff's testator owned a tract of land upon which was a boarding house and a mineral spring. Defendant wished to secure a right of way through the premises. The testator entered into a written agreement with defendant as to the matter and a map was made upon which the locations of the said road, proposed bridges and structures were shown. By this agreement defendant covenanted to build certain bridges and crossings and to erect a station at which regular trains should stop. Having built its road it refused to perform its covenants. The agreement did not specify the size, material or manner in which the crossings, etc., were to be built. *Held*, That the agreement was sufficiently definite and that specific performance should be awarded, and that plaintiff was entitled to an injunction requiring all regular trains to stop at said station.—*Laurence v. The Saratoga Lake RR. Co.*, 814.
15. By an omission to build and maintain fences on the sides of its road a railroad company does not become liable for injuries which cattle or horses may do to themselves by straying on the track.—*Knight v. The N. Y., L. E. & W. RR. Co.*, 361.
16. Plaintiff having refused to pay for extra baggage, defendant's agent refused to deliver the checks or the baggage, which was in plain sight and could have been returned. Defendant's president authorized plaintiff to receive the baggage at P. without checks, and promised it should be stopped there. It, however, went on to C. and was burned there in the depot. *Held*, That defendant was liable for conversion of the baggage.—*McCormick v. The Pennsylvania Central RR. Co.*, 379.
17. In an action to recover for the loss of plaintiff's goods by fire, it appeared that the car in which they were was drawn alongside the depot to be unloaded just before the fire; that the depot roof was old, dry, and covered with moss, and extended down to the car; that a passing engine emitted sparks which lit on the roof, which took fire and the car and contents were burned. *Held*, That it was a question for the jury whether defendant was negligent in keeping the roof in such condition and the use of engines near it, and in placing plaintiff's goods in such proximity to the depot as to be likely to be consumed, and that a refusal to nonsuit was correct.—*Tanner v. The N. Y. C. & H. R. RR. Co.*, 396.
18. The signing of the articles of association of a railroad company by agent is good unless such signature was made without authority, and that fact must be proved by the party attacking its validity.—*In re petition of The N. Y., L. & W. RR. Co. v. The Union Steamboat Co.*, 437.
19. A passenger has the right to assume that the company will provide a safe way to board its train, and that the way taken by other passengers without objection by the company is the right one.—*Brooks v. The N. Y., L. E. & W. RR. Co.*, 464.
20. It is not necessarily, as matter of law, too late for a passenger to board a train after it has begun to move from the station.—*Id.*



21. Failure of defendant's servants in charge of the station to warn a passenger of danger from an approaching train, under the circumstances, *Held*, negligence. —*Id.*

22. Plaintiff's intestate was ejected from defendant's train for not paying his fare. He was subsequently found dead in a pool of water by the side of the railroad, having died of suffocation or drowning. *Held*, That if deceased was so stunned by violence in putting him off, or was so intoxicated, to the knowledge of defendant's employees when he was put off, as to be unable to take care of himself, defendant was liable for causing his death. —*Gill et al v. The Roch. & P. R.R. Co.*, 523.

23. Also *held*, That there was no evidence to support the charge to the jury that they might, as an item of damages, consider and determine the benefit that would be likely to result to the parents of deceased from the counsel and advice that they might have received from their son all during life. —*Id.*

24. Where the court in charging the jury stated, that it seemed from the evidence that the deceased alighted from the train upon which he was a passenger before it had stopped at the station for the discharge of passengers, and while proceeding to cross the intervening track was struck by a passing freight train; and the jury were left to determine the question of the deceased's negligence upon the theory that he attempted to cross the track before the train had stopped, *Held*, Error to refuse to charge, in substance and effect, that in such case the company owed no duty to him as a passenger, and he was bound to exercise the same degree of care and vigilance required of persons crossing a railroad track upon a highway. —*Parsons v. The N. Y. C. & H.R.R.R. Co.*, 525.

See BONDS; COMMON CARRIERS; EMINENT DOMAIN; NEGLIGENCE, 1, 10, 14, 23, 24.

## REAL ESTATE.

See CONTRACT, 3, 4, 19.

## RECEIVERS.

1. The power of this court to remove its receiver of a corporation and appoint another in his place does not depend on any notice to stockholders who have appeared. —*Hoyt v. The Continental Ins. Co.*, 145.
2. The court can act on its own motion *ex parte*. —*Id.*
3. An order for the appointment of a receiver *pendente lite* of a defendant corporation in an action to foreclose a mort-

gage given by such corporation may be made in any county where the action is to be tried, notwithstanding Chap. 378, Laws of 1888. —*The U. S. Trust Co. v. The N. Y., W. S. & B. R.R. Co.*, 191.

4. The statute of 1888 relates only to statutory receivers to wind up a corporation. —*Id.*

5. As between the State and Federal Courts, the court which first acquires jurisdiction of the subject matter of an action to foreclose a mortgage, and which is first put in motion, will retain its control to the end of the controversy, and the possession by its receiver will not be disturbed by the subsequent appointment of a receiver by the other court, except under very extraordinary circumstances. —*The Farmers' L. & T. Co. et al. v. The Southern Tel. Co.*, 457.

6. When an action to foreclose a mortgage upon the property of a telegraph company commenced by the trustee of the bondholders in the courts of this state, is about to be discontinued by the plaintiff for the reason that another action for the same purpose has been previously commenced in the courts of the United States in which a receiver of the defendant's property has been appointed, a bondholder of the defendant will not be made a party plaintiff, upon his application, in order that he may continue the action. —*Id.*

7. Under § 449 Code of Civ. Pro., an action to collect a debt owing to a New Jersey corporation which has been dissolved and a receiver of its property appointed under the laws of N. J. cannot be prosecuted in this State by the receiver in the name of the corporation, although by the laws of N. J. the receiver is empowered to prosecute an action in that form. —*The Merchants' L. & T. Co. v. Clair*, 517.

See ATTORNEYS, 4, 5; BANKS, 5; CORPORATIONS, 19; REPLEVIN, 1.

## RECORD.

See ASSIGNMENT FOR CREDITORS, 3, 4; MANDAMUS, 3; MORTGAGE, 16.

## REFERENCE.

1. When upon the trial of an action before a referee a report made by him in the trial of a previous action between the same parties is admitted in evidence without objection, the referee, in deciding the case, cannot disregard such report as evidence on account of the fact that subsequent to the submission of the case to him, but previous to his decision of it, the judgment entered upon such report has been reversed upon appeal, because there

is no evidence of such reversal before him.—*Hall et al. v. The U. S. Reflector Co.*, 87.

2. The production upon the argument of an appeal of the judgment roll showing the reversal of the judgment entered upon such report will not correct the error of the referee in disregarding such report without evidence of said reversal.—*Id.*
3. A tender of his report by a referee within the time limited is not a delivery within § 1019, Code Civ. Pro.—*Little v. Lynch*, 840.
4. To entitle himself to his fees and keep his report valid in case of an omission of the successful party to take it up the referee must file the same.—*Id.*

See ATTORNEYS, 3; DIVORCE, 3, 4.

#### RELIGIOUS CORPORATIONS.

1. The trustees of St. George's M. E. Church, a corporation organized pursuant to Chap. 60, Laws of 1818, procured an order on petition authorizing them to sell the church property. Before the deed was delivered certain members of the congregation, after serving notice of objection and protest to the trustees on the grounds that no legal order was made; that the consent of the majority of the corporation and congregation had not been obtained and the question of sale had not been submitted to those bodies, obtained an order to show cause why the sale should not be vacated and the trustees restrained until the questions were submitted to the corporation and congregation. On an appeal from the order refusing to vacate and stay, *Held*, That the trustees held the property in the same sense as directors of civil corporations; that the method adopted was in accordance with the rules of the church; that the meeting and vote insisted upon were not essential.—*In re St. George's M. E. Church*, 81.

#### REPLEVIN.

1. A receiver appointed in supplementary proceedings cannot maintain an action to recover the possession of personal property transferred by the judgment debtor before his appointment, by way of mortgage, where the mortgagee has taken possession by virtue of his mortgage.—*Pettibone v. Drakeford*, 96.
2. Where a sheriff attached goods under process against one T. and plaintiff claims title through the same person it is entirely irrelevant who owns the goods if T. does not.—*Siedenbach v. Riley*, 394.
3. A denial of plaintiff's title is not alone a good defense.—*Id.*

4. If the bill of sale to plaintiff was *bona fide* and was followed by possession, plaintiff is entitled to recover.—*Id.*

5. A failure to give possession only raises a presumption of fraud, which may be rebutted by proof that the transaction was fair.—*Id.*

6. There is no need of a demand if the complaint averred an unlawful detention.—*Id.*

See COMMON CARRIERS, 3.

#### RESIDENCE.

See SURROGATES, 7.

#### RESTITUTION.

See APPEAL, 15.

#### REVIVOR.

See EJECTMENT, 2.

#### SALE.

1. A vendee in good faith, trusting to his vendor's statement that he owes no debts, is not bound, in favor of the vendor's creditors, to make further inquiries and investigate the vendor's condition.—*Manning et al. v. Ehnis et al.*, 27.
2. Mere inadequacy of price is not enough to set aside a sale as a fraud on creditors.—*Id.*
3. Possession by the vendor after sale of personal property does not render the sale void as against creditors if the transfer was made in good faith.—*Id.*
4. In an action to recover on an executed contract for the sale of personal property the statute of frauds is not the standard by which the admissibility of evidence as to the price for which the goods were to be sold is to be determined, and therefore an unsigned memorandum as to the price endorsed on the printed conditions of sale is admissible.—*Porter et al. v. Smith et al.*, 210.
5. Where the holder of a sold note, being the vendee therein named, makes a delivery order in favor of a third person, which is accepted by the vendor, such third person is entitled to the property referred to in said sold note as therein provided, upon the fulfillment of the conditions of the original contract by the parties thereto. Consequently, if payment was to be made in the vendee's notes, which are duly given and accepted in payment, the holder of such an order is entitled to the property or its value, though the vendee becomes insolvent before the maturity.

ty of his notes. This holds good as to property to be manufactured.—*Anderson v. Reed et al.*, 271.

6. Plaintiff delivered to one B. a soda water apparatus and took back an instrument stating that B. leased said apparatus for which he agreed to give his notes for a specified sum, and that on full payment of said notes all claim of plaintiff to said property should cease, but upon any breach of the provisions of the lease or upon failure to pay either of said notes, B.'s right of possession should terminate and plaintiff might resume possession without hindrance from the lessee. In an action brought after default in payment of the notes to recover possession of the apparatus from a *bona fide* purchaser of the same from B. without notice of the above instrument, *Held*, That he was entitled to recover.—*Puffer v. Reeve*, 352.

7. By accepting and retaining goods sent to him by plaintiff accompanied by a bill for the same stating that the goods were bought by defendant of plaintiffs and giving the terms of credit, *Held*, That defendant ratified the terms of such bill of sale, although he had paid plaintiff's traveling salesman for the goods at the time of giving the order, such salesman not being authorized to receive payment for plaintiffs.—*Brigham et al. v. Fish*, 531.

See CONTRACT, 1, 2, 6, 7; EVIDENCE, 16; LUNATICS; NEGOTIABLE PAPER, 12.

## SANITARY LAWS

See INJUNCTION, 2.

## SCHOOLS.

1. Chap. 248, Laws of 1884, continuing the colored schools then existing in the City of N. Y., does not prohibit the proper officers from changing the location of one of such schools if such change is for the benefit of the school; but it does prohibit any change which would affect the capacity of the school to receive its pupils, or would degrade the school or destroy its usefulness.—*Reason v. The Board of Education*, 151.

2. D. was hired by H., trustee of a school district, as a teacher. H. gave D. orders for his salary upon the tax collector, which the latter refused to pay. Defendant succeeded H. in the office. Plaintiffs, assignees of D., recovered against defendant the amount of the orders. The judge certified that it appeared upon the trial that defendant acted in good faith. *Held*, That plaintiffs were entitled to costs; that § 8244, Code Civ. Pro., did not apply, as defendant had not done or omitted any-

thing as to which an appeal lay to the State Superintendent of Public Instruction.—*Durfee et al. v. McCall*, 387.

## SEDUCTION.

1. A cause of action by a parent for the seduction of his child is made out by proof that the girl was debauched without his consent, which resulted in a loss to him of her services, whether defendant accomplished his purpose by promises, artifice, flattery or violence.—*Lawrence v. Spence*, 539.

See EVIDENCE, 10.

## SERVICE.

1. The court at Special Term has no right to grant an order for service of summons by publication under § 440, Code.—*Crosby v. Thedford*, 544.

2. An affidavit of plaintiff's attorney stating that he had caused inquiry to be made as to the residence of defendants and that certain defendants were non-residents and resided in Ireland, accompanied by an affidavit stating that deponent received copies of the summons to serve; that he had served some of defendants but cannot after due diligence serve defendants named, is sufficient proof of due diligence to sustain an order for service by publication.—*Wunnenberg v. Gearty et al.*, 549.

3. Affidavits showing that the defendants to be served are residents of other States and that they are at the time at their respective places of residence are sufficient to show that such defendants cannot after due diligence be found within the State and to support an order for service by publication.—*Chase v. Lawson*, 571.

See CORPORATIONS, 3-5.

## SERVICES.

1. In an action to recover the value of services, where the issue is as to what was the agreed price, evidence of the value of the services is competent as bearing on the probable truth of the claims of the respective parties.—*Cornish v. Graff*, 383.

2. In an action to recover for services the defendant has a right to prove what payments have been made. A general objection to such evidence presents no ground for its rejection.—*Collins v. Jones*, 562.

3. In an action to recover for services it appeared that the testator before becoming a member of plaintiff's family asked the consent of plaintiff's wife and of

plaintiff and made a bargain with her as to the terms upon which they would take care of him. He was broken in health, nervous and irritable. He was a cousin of plaintiff's wife's father. *Held*, That plaintiff was entitled to recover.—*Webster v. Nichols*, 568.

4. It was shown by the defense that testator did a little work about the house and sometimes bought some supplies; and this was urged as a fulfillment of his promise of payment. *Held*, That it was proper for plaintiff to show the amount of his property, and that testator was reasonably well off.—*Id.*
5. Where an executor resists such a claim and reduces it one third, no costs should be allowed against him below or here.—*Id.*

See APPEAL, 23; CONTRACT, 5; NEW YORK CITY, 1.

#### SET OFF.

See AGENCY, 2, 3; BANKS, 6; MASTER AND SERVANT, 6.

#### SHERIFFS.

1. When the sureties on a bond of indemnity given to a sheriff bind themselves absolutely to keep him harmless from any judgment which may be recovered against him for the seizure and sale of property under an execution, they are bound by the regular recovery, of a judgment against him although they were not notified of the proceedings in the action resulting in its recovery and it is not necessary that the judgment should have been paid before the sheriff can proceed against them on the bond.—*Connor et al. v. Reeves et al.*, 252.
2. The sureties on such a bond will be bound when the judgment against defendant has been recovered in good faith and without collusion or fraud, and the consent of the sheriff to its entry, alone, when it may be given in good faith and as the best alternative which can be adopted, will not render a judgment collusive.—*Id.*

See ATTACHMENT, 8; EXECUTION, 9; INDEMNITY, 3; REPLEVIN, 2.

#### SLANDER.

1. The death of one partner does not abate an action of slander originally brought in the name of all the partners.—*Shale et al. v. Schantz*, 294.
2. Communications by a resident of a school district to the school commissioner relative to the moral character of the school

teacher in that district are qualifiedly privileged. It was error to refuse to charge the jury that if defendant went to the commissioner and in good faith stated what he believed to be true about plaintiff it was a privileged communication.—*Decker v. Gaylord et al.*, 360.

8. A person vested with the control of a public institution and its employees, subject to the decision of its board of trustees or its executive committee, is within the class of persons whose communications made to his superior in the discharge of a duty are *prima facie* privileged.—*Halstead v. Nelson*, 371.
4. The fact that the meeting of the committee at which such communication was made was not held on a day fixed by the by-laws will not render the occasion an unprivileged one.—*Id.*

#### SPECIFIC PERFORMANCE.

1. A parol promise by the owner of land to give it to another, accompanied by actual delivery of the possession thereof to him, will be enforced in equity where the promisee is induced by such promise to make substantial improvements and considerable expenditures on the premises with the knowledge of the promisor.—*Van Arsdale v. Perry*, 116.
2. Where the owner of land promised to give to his newly married daughter one of his farms if she would abandon her intention of removing to another county and take up her residence near him, and she and her husband, relying upon such promise, and in pursuance thereof, took possession, cultivated it, erected buildings and made other substantial improvements and continued in sole possession for twenty years, it was held that her heirs were entitled to specific performance.—*Id.*
3. Where the testator devises his real estate charged generally with debts, the devisee, after three years from the granting of letters testamentary, can give to a *bona fide* purchaser a good title, free and discharged of such debts.—*White v. Kane*, 180.

See CONTRACT, 3, 4; RAILROADS, 14.

#### STATUTE OF FRAUDS.

See CONTRACT, 8, 12; FRAUD, 8; MARRIAGE, 3.

#### STATUTES.

1. Section 38 of Chap. 568, Laws of 1890, being but a re-enactment of the provisions of the charter of 1859, and expressly adopting the system of the Revised Stat-

utes in respect to the number of jurors required, the provisions of the amendment of 1875 to the Revised Statutes are not to be deemed incorporated therein.—*In re altering Main St.*, 207.

2. The provision contained in § 6 of Ch. 459, Laws of 1877, and § 7 of Ch. 487, Laws of 1879, was not intended to restrict said acts to officers thereafter elected or appointed. It has reference to § 18 of Art. 3 of the Constitution, which does not apply to officers whose salaries are fixed.—*Mangam v. The City of Brooklyn*, 405.

See ABANDONMENT; CANALS; CHILDREN; CORPORATIONS, 20; CURTESY, 1; FERRIES; MANDAMUS, 2; NEGLIGENCE, 20; OFFICE; RECEIVERS, 3, 4; SCHOOLS, 1; TAXES, 9; TOWN BONDS, 2.

#### STOCKHOLDERS.

See CORPORATIONS, 9-12, 18, 19.

#### STOCKS.

1. The committee on securities of the N. Y. Stock Exchange has no jurisdiction to determine the legality of a tender or delivery of bonds to a purchaser who refuses to receive them upon the ground that the seller cannot convey a good title.—*Morris v. Grant et al.*, 123.
2. A determination by a committee of the N. Y. Stock Exchange of such a question between members of the Exchange, one of whom is the purchaser of certain bonds from the other, who is a pledgee of the same, and who is selling them to pay his loan, is not binding upon the pledgor, who is not a member of said Stock Exchange, and has had no notice of the proceedings resulting in such determination nor opportunity to be heard therein.—*Id.*
3. The purchaser of bonds regularly sold by a *bona fide* pledgee of the same has no right to refuse to receive them for the reason that intermediate the sale and the delivery a third party has served a notice upon the pledgee that he claims said bonds upon the ground that they were deposited by him with the pledgor as collateral security for a loan, and that the latter had no authority to pledge them. Such a notice does not prevent the pledgee's conveying a good title upon such sale.—*Id.*
4. An agreement by which the parties unite in purchasing stock and agree that one shall hold the same until they agree on a sale is not unlawful. Hope or expectation of a rise does not make the contract a wager one. A defense that the transaction sued upon was a wager contract must be pleaded.—*Vischer v. Bagg*, 399.

5. Pledges may be retained until the purposes for which they were given have been accomplished.—*Id.*

See ATTORNEYS, 4, 5; CORPORATIONS, 18-20; FRAUD, 5.

#### SUMMARY PROCEEDINGS.

See CURTESY, 2; LEASE, 9.

#### SUPERIOR COURT.

See COSTS, 2, 3.

#### SUPPLEMENTARY PROCEEDINGS.

1. The provisions of the Code of Civ. Proc. relative to proceedings subsequent to execution are not applicable where the judgment on which execution issued was recovered in the Municipal Court of the City of Rochester for less than \$25 damages.—*Mason v. Hackett*, 79.
2. No order for the examination of defendant in proceedings supplementary to execution can be based on a return to an execution, made at plaintiff's request, that real estate had been levied on and advertised for sale and that no other property could be found.—*Murx et al. v. Spaulding et al.*, 275.
3. An order for the examination of a defendant in supplementary proceedings cannot be upheld upon a motion to vacate it for the reason that it is based upon a return to the execution which did not warrant its granting, upon proof that a sufficient return should have been made. The remedy is to require the sheriff to make the proper return and, if he refuses, to move to compel him to do so.—*Id.*
4. The court has no power to order the judgment debtor to pay over to the receiver money received and retained by him in another state or due to him there; the most that can be done is to require him to transfer his title to the money to the receiver.—*Buchanan v. Hunt*, 288.

See TAXES, 4.

#### SURETYSHIP.

1. An agreement with one of two co-obligors, jointly and severally bound, not to sue him does not discharge the other obligor, but the other is liable for only one-half the debt.—*Benedict v. Rea*, 78.
2. In 1880 defendant with others executed as surety a bond to secure the performance by a bank, designated as a depository for canal tolls, of an agreement as to such deposits made by it with the State. At the end of 1880 the bank had on hand a large State deposit. In 1881 the bank

- was again designated and a new bond given and accepted by the state upon which defendant was not a surety but one Z. was, the other sureties remaining the same. In 1882 the bank failed. In an action on the bond of 1880 to recover the balance due the State at the end of that year, *Held*, that in the absence of any proof that the bond of 1881 was agreed to be taken by the State in lieu of the bond of 1880, or that the latter bond was cancelled or surrendered, defendant was liable.—*The People v. Cushing*, 261.
8. The sureties on a bond for faithful performance by their principal of the duties of his position are not discharged by the imposition of new duties which are separable and distinct from those protected by the bond, unless such new duties render impossible or materially hinder or impede the proper performance of the duties guaranteed, even though the new employment exposes their principal to temptation or gives a broader opportunity for dishonesty.—*The Mayor, &c., of N. Y. v. Kelly et al.*, 326.
  4. Where a surety would escape liability by reason of a request to the creditor to sue the principal debtor, he must show that the latter was solvent at the time of the request, and has since become insolvent.—*Wheeler et al. v. Benedict et al.*, 336.
  5. Where the payee and holder of a note past due told the surety that he did not consider him holden upon it, but it did not appear that the surety intended or was able, at the time, to pay the holder, nor that by the holder's statement the surety was prevented or influenced not to pay the holder at that time; nor that if the surety had then paid it he could have then collected the amount of the principal debtor, *Held*, That the holder was not estopped, and could recover of the surety.—*Id.*
- See EXECUTION, 8; LEASE, 7, 8; TRESPASS, 8.
- #### SURROGATES.
1. A petition for payment of a debt set forth that the claim had been presented to the executors and not rejected or paid, and that the statutory time had elapsed. The executors orally denied the allegations. Proof was given of presentation of the claim to one of the executors, that it had not been rejected, and that the personal estate was sufficient to pay it. The executors did not ask for an accounting, or show the existence of other debts. The surrogate decreed payment. *Held*, No error.—*Lambert v. Craft*, 181.
  2. A petition under § 2717 of the Code need not set forth the facts which make out the debt.—*Id.*
  3. The written answer of the executor under § 2718 must set forth facts showing that the validity or legality of the claim is doubtful, and also a denial of its validity or legality. Both conditions must concur.—*Id.*
  4. A surrogate has power and authority by implication to make an allowance for past maintenance of infants upon an accounting of executors or administrators in a case where such expenditure would have been authorized if an application had been made in advance.—*Hyland et al. v. Baxter et al.*, 426.
  5. His determination on such a question is conclusive upon the parties until set aside or reversed.—*Id.*
  6. A writ of prohibition should not be granted to restrain a surrogate from taking proof of a will where the petition for proof stated the facts necessary to confer jurisdiction, but objection was thereafter made that decedent was a resident of another county. The presentation of the petition gave the surrogate jurisdiction of the subject matter, and the objection raised an issue which the surrogate had power to determine as incident to the subject matter, and his decision if erroneous could be reviewed on appeal, but not assailed collaterally.—*The People ex rel. James v. Surrogate of Putnam Co.*, 498.
  7. Where a person has two residences at different seasons of the year, that will be deemed his domicile which he himself elects or describes as his home or where he votes or exercises the rights and duties of a citizen.—*Id.*
  8. When upon the judicial settlement of the account of an administratrix whose intestate was the general guardian of a ward who lived with him and whom he had charged for board, the ward is allowed to testify without objection that she did not think that her board bill was correct, and that she should have been credited with the value of services performed by her for her guardian, and an allowance is made her by the surrogate for such services, it is too late to raise the objection upon appeal that the charge for board in the account had not been properly surcharged or objected to as excessive, and that no claim or demand for services had been interposed on behalf of the ward.—*In re settlement of accounts of Clark*, 568.
  9. Where a ward boards in the family of her guardian and is charged for board, and while so residing in her guardian's family renders services of value, those services should be allowed as a claim to reduce the charge for board.—*Id.*

10. Section 2561, Code of Civ. Pro., by which \$10 costs may be allowed for each additional day beyond two days where a trial or hearing before the surrogate necessarily occupies more than two days, is equally applicable to a hearing before a referee appointed by the surrogate as to a hearing before the surrogate in person; but the said section does not contemplate or empower any allowance for days on which an adjournment occurs without any actual hearing.—*Id.*

11. While a surrogate is not chargeable with interest on a fund received and simply retained by him for distribution, yet where he places such fund where it draws interest such interest becomes a part of the fund, belongs to the beneficiaries, and the surrogate will be required to pay it over with the principal.—*In re Coffin*, 568.

See CONTEMPT, 1, 2.

#### TAXES.

1. The whole amount of a fund held by executors on deposit in trust companies under a decree of a surrogate to await the determination of contested claims against the estate which exceed the amount of the fund is subject to assessment and taxation.—*The People ex rel. Osgood v. Tax Comrs.*, 93, 878.

2. Contested and disputed claims against an estate are not just debts within the meaning of the statute entitling a person assessed as executor, etc., to have deducted the just debts due from him in his representative character.—*Id.*

3. Ch. 382, Laws of 1879, ch. 402, Laws of 1881, and ch. 516, Laws of 1883, acts which, as to certain counties, provide a new method for the collection and payment of arrears of the state tax, are constitutional.—*The People v. The Board of Suprs. of Ulster Co.*, 258.

4. In supplementary proceedings taken to collect a tax under Chap. 640, Laws of 1881, the affidavit will be sufficient if it state the facts required by § 1 of that act; it is not requisite that it state also the facts necessary to show the jurisdiction of the assessors and of the supervisors.—*Proceedings to collect tax of Conklin*, 329.

5. Where the evidence before the assessors fails to show that the assessment is erroneous in whole or in part it is their province to determine the amount of the property liable to taxation.—*The People ex rel. Osgood v. Tax Comrs.*, 378.

6. A board of supervisors fixed the equalized valuation of a town and entered the same in the assessment roll; it determined

the amount of tax to be raised and its rate, delivered its warrant for the collection of the tax affixed to the assessment roll to the supervisor of the town and adjourned *sine die*. It had previously directed the supervisor to extend the amount of taxes against each of the persons and their property named and described in the roll. He did so. *Held*, That the warrant was void and that plaintiffs got no title by a purchase at a sale under the same.—*The People v. Hagadorn et al.*, 430.

7. Where the comptroller sells lands for nonpayment of the taxes for several years, the taxes for some of which years are regular and for other years void, the void taxes will invalidate the sale.—*Id.*

8. The failure of a telegraph company to make the report required by § 3 of Chap. 471, Laws of 1858, does not deprive the tax commissioners of jurisdiction to assess its property, but in so doing they may proceed upon such information as they have.—*The People ex rel. The Mutual Tel. Co. v. Comrs. of Taxes*, 438.

9. Ch. 269, Laws of 1880, giving a remedy by *certiorari*, does not permit a party complaining to lie by without availing himself of the opportunity to remedy his grievance by application to the commissioners.—*Id.*

10. In the City of New York it is not essential to the validity of a tax upon land that the name of the owner should be inserted in the assessment list.—*Haight v. The Mayor, &c., of N. Y.*, 450.

11. The only effect of an omission of, or an error as to, the name of the owner is to deprive the city of its right to collect the tax from the owner's personal property and confine its remedy to the enforcement of the lien on the lands.—*Id.*

12. The premises No. 108 Second avenue, in the City of New York, belonging to the Swiss Benevolent Society, a corporation incorporated for the purpose of affording pecuniary and other relief to such persons, natives of Switzerland or of Swiss origin, as may be in the United States and in need of assistance, and used to give a temporary home, asylum and relief to the sick, necessitous and others who may be proper objects of its bounty in accordance with its charter, is an "almshouse" within the meaning of sub. 4 of § 4, 1 R. S. 388, and as such is exempt from taxation.—*The People ex rel. The Swiss Ben. Soc. v. Comrs. of Taxes*, 492.

13. The committee of the property of a lunatic is a trustee within the meaning of 2 R. S., 7th ed., 789, § 5, and 991, § 10, and the property of the lunatic in his hands is taxable under said statutes, and such property cannot be considered to be in

*custodia legis* and therefore non-taxable.—*The People ex rel. Smith v. Comrs. of Taxes*, 648.

See APPEAL, 4; CONTRACT, 4; CORPORATIONS, 27; HIGHWAYS, 8, 9; PARTITION, 1.

#### TELEGRAPH COMPANIES.

See TAXES, 8.

#### TENEMENT HOUSE ACT.

See CONSTITUTIONAL LAW, 11-13.

#### TITLE.

See BANKRUPTCY; CONVERSION, 7; EXECUTORS, 18; LIMITATION, 6; SPECIFIC PERFORMANCE, 8; TAXES, 6, 7.

#### TORT.

1. A release of one joint tortfeasor, on satisfaction by him, operates as a discharge for all the wrongdoers.—*De Long v. Curtiss et al.*, 131.

See APPEAL, 12.

#### TOWN AUDITORS.

1. An action by a taxpayer to vacate an audit of bills by the Town Board on the ground that such audit was illegal and without authority may be maintained under Chap. 161, Laws of 1872.—*Osterhoudt v. Rigney et al.*, 403.
2. A board of town audit has no power to audit and allow claims which have been rejected by a prior board on the merits. Where a portion of such prior claim is included in an audit in such a manner that it cannot be ascertained how much has been allowed for the new legal charge the whole of such audit should be vacated.—*Id.*

See PARTIES, 1.

#### TOWN BONDS.

1. The legislature may, by direct enactment, impose the characteristics of commercial paper on municipal bonds, and may declare innocent purchasers of such bonds, when they are issued by the proper officer having apparent authority, to be *bona fide* holders and as such protected.—*Alvord v. The Syracuse Savings Bank et al.*, 421.
2. Under Chap. 571, Laws of 1868, the purchaser for value of bonds issued under that act had a right to rest on the determination of the assessor and the act of the commissioner, and was not bound to go behind them.—*Id.*

3. The board of town officers mentioned in § 1 of that act is the board of town auditors.—*Id.*

See TOWNS.

#### TOWNS.

1. An action against the railroad commissioners of a town and others for alleged wrongful conduct in issuing town bonds, by reason whereof the town rights and property may be injuriously affected, may be maintained in the name of the supervisor.—*Mitchell v. Strough et al.*, 225.
2. The bonds were issued by the commissioners in 1872, and delivered to the railroad while the adjudication of the county judge was in force. This action was brought in 1879. *Held*, That the cause of action was barred by the statute of limitations.—*Id.*

#### TRESPASS.

1. Plaintiff's complaint alleged a wrongful cutting of timber by defendant on lands owned and occupied by plaintiff, named the damage and demanded "judgment for treble damages, amounting to \$250." The answer was a general denial. The verdict assessed plaintiff's actual damages at \$12.50, and awarded him treble damages. *Held*, A claim of title was raised on the pleadings within § 3228, subd. 1. Code Civ. Pro.—*Crowell v. Smith*, 26.
2. The party injured by a trespass may bring as many actions as there were wrongdoers. He can have but one satisfaction for damages, but may have the costs in all the actions.—*Lord et al. v. Tiffany et al.*, 377.
3. T. commenced separate actions against S. and L. for the same trespass and recovered judgment in each. Upon affirmance he brought actions on the undertakings and recovered. One of the sureties of S. paid nearly the full amount of the judgment against him and assigned to T. his claim for reimbursement against his principal co-surety. *Held*, That on the payment of a sum sufficient to pay the balance of the damages and the costs in all the actions S. and his sureties would be released, and that the co-surety was entitled to be released from one-half of the judgment against him.—*Id.*
4. Defendant inherited the land in dispute from his father, who was dead at the time of the trial of this action for trespass. As a witness in his own behalf plaintiff testified that he cut timber on the disputed land in the presence of defendant's father, and that their conversation at the time was friendly. *Held*, That the evidence was improper under Code, § 829.—*Oliver v. Freleigh*, 411.



5. In an action to recover damages for being deprived of the use of a farm crossing while defendant was rebuilding a bridge a witness was allowed to testify what in his opinion was the difference in value of the use of the farm without and with the obstruction. *Held*, proper.—*Vandenburg v. The B. & A. R.R. Co.*, 474.

6. D. conveyed to plaintiffs six acres, a mill site on the same, the use of all the waters of a creek and the right to use and maintain a dam across it and to convey its waters to the mill. The dam was a quarter of a mile distant from the six acres. Plaintiffs went into possession, under their deed, of the mill, the dam and the raceway and put the same in good condition. Defendant, who as against plaintiffs makes no claim of title or possession, negligently floated logs down the stream and destroyed the dam. D. had no title to the land on which the dam and raceway were, but claimed a right to maintain them. *Held*, That plaintiffs could recover damages for the destruction of the dam.—*Trevitt et al. v. Barnes et al.*, 560.

See EVIDENCE, 8; PARTY WALL, 2; RAILROADS, 6.

#### TRUSTEES.

See CORPORATIONS, 15, 16, 21-26, 29; EXECUTORS, 2, 3, 6, 12, 13; RELIGIOUS CORPORATIONS; SCHOOLS, 2; TRUSTS, 4.

#### TRUSTS.

1. E. W. conveyed on Nov. 8, 1876, certain real property to W. E. W., who executed an agreement to convey one-half of the same to S. upon the death of E. W. and equally to the children of S. or the issue of her deceased child or children if she had died leaving issue. Subsequently, by an instrument executed March 16, 1881, by E. W., W. E. W. and S., which recited that a previous assignment of certain real and personal property had been made by E. W. to W. E. W. and that a declaration of trust as to the real estate had been made by the latter, it was agreed that W. E. W. should hold the personal property in trust during the life of E. W., to pay a certain sum annually to him from the income thereof, and to divide the surplus of said income, and the net rents, issues and profits from the real estate previously conveyed to W. E. W. equally between W. E. W. and S. during the life of E. W., and upon his death to divide any surplus income then unpaid and all of the personal property equally between W. E. W. and S. W. E. W. died during the life of E. W., leaving him surviving his wife, to whom he devised all his estate both real and personal. *Held*, That by the instrument executed on March 16,

1881, the whole of the real as well as the personal property was impressed with a trust for the benefit of E. W. and for the benefit of S. and her children, and that upon the death of W. E. W. such trust vested in the Supreme Court.—*In re petition of Waring et al.*, 120.

2. One T. conveyed certain personal property to D. upon the following trusts: "To pay all existing debts and liabilities of the grantor, to invest the residue and apply the income thereof to the use of the grantor's wife during her life, and after her death to the use of the grantor for his life, and after the death of both to pay over the principal to their children." In an action brought during the life of the grantor's wife by a judgment creditor of T. to have the trust deed declared void as against him, except in so far as it provided for the payment of existing debts and the trust for the grantor's wife; to have the property transferred by said trust deed adjudged to be vested in the said grantor, subject only to the estate of the trustee for the life of the wife, and to have such estate or interest of the grantor subjected to the payment of the plaintiff's judgment through the medium of a receiver. *Held*, That the deed was valid during the lifetime of the wife, and that there was no estate or interest in the grantor which a receiver could take.—*Meyer v. Thomson et al.*, 258.

8. A. consigned his real estate and personal property to B. and took back two agreements indicating that the property was conveyed to enable the grantee to carry out certain purposes. Subsequently an agreement in writing was made by both which recited that the prior agreements constituted a declaration of trust and that B. held the property in trust for said purposes. *Held*, That the facts were sufficient to authorize the court to determine that an apparent legal trust was created and that some of its objects remained unperformed at the death of B. and these facts authorized the appointment of a trustee by the Supreme Court.—*In re petition of Waring et al.*, 420.

4. In an action to declare a trust void the trustee is not chargeable with more than the rents received by him, there being no allegation or implication of wrongful entry or trespass.—*Jackson v. Andrews et al.*, 505.

See BAR, 1, 3; CREDITOR'S ACTION, 2, 8; EXECUTION, 5; MORTGAGE, 7, 14, 15; WILLS, 9, 21-25.

#### UNDERTAKING.

1. The defendant in an action on the morning of the return day of the summons executed an assignment of personal prop-

erty to her father in alleged payment of a debt and delivered it to his attorney, who is not shown to have had authority to receive anything but money; the attorney delivered it to a son of his client who delivered it to his father in the evening. In an action upon an undertaking given on the adjournment of the action that afternoon the witnesses who testified in relation to the assignment and its delivery were all interested in the event. *Held*, That there was evidence sufficient to sustain a finding that there was a breach of the conditions of the undertaking.—*Sheridan v. Farnham*, 470.

See APPEAL, 7, 16; ARREST, 4, 5; ATTACHMENT, 1-4.

### USURY.

1. Defendant having taken excessive interest from one McR., the latter agreed to discharge all claims in his favor on account thereof, and not sue or allow any suit to be brought against defendant on account thereof, and in consideration thereof defendant agreed to discharge all of his indebtedness to defendant which might remain after applying all other collections available. *Held*, That this operated as a release and discharge of McR.'s cause of action and was a good defense to an action brought by McR.'s receiver to recover such excessive interest, and that the original liability of defendant was not revived upon its mere failure to perform its part of the agreement.—*Moorehouse v. The Second Natl. Bk.*, 380.
2. Where the borrower, in addition to interest, agrees to pay the expense of a search and for getting the papers ready, this is not a basis for usury.—*Chesebro v. Tilden*, 467.
3. The payment by the borrower and surrender of a note executed by the lender, in addition to interest on the sum borrowed, is not usury when such payment is made as a fair compensation for the trouble and expense to which the lender was subjected and not as a device to obtain more than legal interest.—*Id.*

See MORTGAGE, 22, 30, 31.

### VENUE.

1. Where plaintiff brought an action against defendants as Commissioners of Highways of a town in the County of Schenectady, charging that he had rendered services to their predecessors in office and that defendants, as such commissioners, had refused to pay him therefor, and had neglected to raise money to pay him as was their duty. *Held*, That, under Code Civ. Pro., § 983, subd. 2, Schenectady was the proper county for the trial of the action.—*Clute v. Robinson et al.*, 120.

### VILLAGES.

1. Defendant is a village corporation carved out of the territory of New Castle, and incorporated under Chap. 291, Laws of 1870. Plaintiff's horse was killed by reason of a defect in a bridge which was within the limits of the village. *Held*, That the town and not the village is liable.—*Washburn v. The Village of Mt. Kisco*, 173.

### WAIVER.

See BAR, 1; EVIDENCE, 12; FIRE INSURANCE, 6, 7; PLEADING, 6, 12; PRACTICE, 11.

### WARRANTY.

See CONTRACT, 7; PRACTICE, 19.

### WASTE.

See MORTGAGE, 28.

### WATERCOURSE.

1. A person has no right by ditches and artificial channels to take water from its natural course and accustomed channels and throw it upon the lands of another; and the rule is the same even if the water so diverted is all surface water.—*Vernum v. Wheeler*, 171.
2. A person is liable for damage to the adjoining owner if he so diverts water and discharges it first upon his own premises where it sinks into the soil and by percolation through the soil reaches the premises of the adjoining owner.—*Id.*
3. When a corporation or individual attempts by artificial means to interfere with the natural action of water to serve its or his own purposes, he must see to it that it shall be done in such a way as shall not unnecessarily do any injury to his neighbor.—*Mitchell v. The N. Y., L. E. & W. RR. Co.*, 199.

### WILLS.

1. Where the testatrix had testamentary capacity, a present knowledge of the contents of the will, and was surrounded by all the safeguards provided by the statute, the will can be avoided only by influence amounting to force or coercion and proof that it was obtained by this coercion.—*In re will of Martin*, 1.
2. To establish fraud or undue influence in the execution of a will something more must be shown than the relation of parent and child and an opportunity for unfair dealing. There must be evidence that the parent was imposed upon or overcome by the practices of the child to the benefit of the latter.—*Id.*

3. The testator was dying of acute peritonitis, was heavy and listless, and under the influence of opiates. About an hour and a half before his death, but not at his request, a lawyer was summoned to make his will. The testator did not volunteer to the lawyer any suggestions as to the provisions of the will and all instructions were gotten by questioning him in the simplest way. Once the testator said he would not make a will that night, but the doctors advised him that he had not long to live. *Held*, That probate should be refused and that the issues of undue influence and a want of testable capacity must be tried by a jury.—*Renihan v. Dennin*, 65.
4. The will of testatrix, after providing that her executor should hold two parcels of real estate in trust to apply the income thereof to the maintenance of her mother and youngest son, or should sell the same and apply the income derived from the proceeds to the same purpose, and that, upon the death of her mother and the coming of age of her youngest son, one of such parcels, or the avails thereof if it should have been sold, should be given to her youngest son, contained the following clause: "And all the rest, residue and remainder of my property and estate I do then give, devise and bequeath to my children John, Thomas, and Mary, the survivor and survivors of them, share and share alike." *Held*, That the right to take the residuum of the estate vested at the time of the death of the testatrix in the three children named.—*In re accounting of Mahan*, 122.
5. The will in question was in testator's handwriting, and contained no attestation clause. One of the witnesses testified to facts showing the will to have been properly executed. The other testified that testator told him that he had a paper he desired him to witness, and while witness was signing his name told him it was his will and asked him to sign as witness; that witness advised testator to have it redrawn, on account of informality, and testator replied he had no fears of it; that witness then finished his signature. *Held*, That the evidence was sufficient to authorize a finding that there was a complete execution and attestation of the will.—*In re will of Phillips*, 140.
6. By testator's will the residue of the estate was given to his wife to be used and enjoyed by her during her life, and after her death it was given to his children to be equally divided between them. The will also directed the executors to collect in all debts, etc., due to testator, and to pay over the proceeds to the person or persons entitled thereto. The executors were not named as trustees, and no trust was in terms created. *Held*, That it was the duty of the executors to turn the personal effects into money and deliver the same to the widow that she might use and enjoy the same; that there was nothing requiring the executors to act as trustees, holding the body of the estate during the life of the widow.—*In re accounting of Woods*, 188.
7. A will providing for an estate in remainder in case of the death of another, refers to a natural and not a civil death.—*Avery v. Everett et al.*, 268.
8. At common law a felon imprisoned for life could acquire an estate by grant or devise, which would not devolve upon his heirs by reason of his civil death, nor in such case would an estate in remainder dependent upon his "death" vest in interest or in possession.—*Id.*
9. The will of the testator contained the following clause: "I do give and bequeath to my son, R. W., my friends, W. H. M. and C. G., and my nephews, J. T. W., R. R. W., and E. B. W., and my son-in-law E. M., the survivor and survivors of them, the sum of \$100,000, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or, in case any of my descendants should become poor and needy, then to apply in whole or in part to such descendants." *Held*, That there was no attempt to create an unauthorized trust, but that the gift was an absolute one and the provision of the will was valid.—*Willets et al. v. Willets et al.*, 285.
10. An action for the construction of a will cannot be supported unless it appear that there is an actual disagreement between the plaintiff and the executors as to the provisions of the will, the true meaning of which is necessary to the present direction and action of the executor or trustee.—*Wead et al. v. Cantwell et al.*, 290.
11. The court will not anticipate difficulties nor decide upon the construction of remainders, etc., which may never take effect, especially where the will is clear as to the present duty of the trustee or executor.—*Id.*
12. As the wife of a contestant of a will, who is also an heir at law of the decedent, would become vested with an inchoate right of dower in the lands of decedent if the will should be declared void and refused probate, she is interested in the event of the proceeding, and so disqualified, under § 829 of the Code, from testifying as to personal transactions or communications with the deceased for the purpose of showing her mental and phys-

ical condition; and this, although both are legatees under the will.—*In re probate will of Hewitt*, 296.

13. A devise of a parcel of testator's farm to his widow, "to have and to hold for her benefit and support," and "all the remainder of my property" to his son, gives the widow an estate in fee; the intent to give a less estate not appearing by express terms nor being necessarily implied in the terms of the devise. "The remainder of my property" refers not to the devise of a remainder in fee, but rather to all the property not included in the devise to the widow.—*Crain v. Wright*, 299.
14. Certain terms of a will held to indicate an intention on testator's part to charge the payment of legacies upon real estate.—*Cornue v. Webb et al.*, 309.
15. Testator, after giving his widow a life estate, directed that at her death the property should be divided in equal shares, one of which he gave absolutely to each of his children. The will provided that if either of his children died without issue his share should be divided between the survivors and their heirs. *Held*, That the words of survivorship related to the death of the widow and the period of distribution, and at that time each child was entitled to his share absolutely, and the subsequent death of either without issue vested no estate in the survivors.—*Müller v. McBlain*, 316.
16. The will of the testator contained the following clause: "I give and devise to my wife, J. M. D. E., all the rest and residue of my real estate as long as she shall remain unmarried and my widow; but on her decease or remarriage, the remainder I give and bequeath to my son H. or his heirs." *Held*, That H. having survived the testator the fee vested in him, and that a deed executed by him and testator's widow, conveyed the fee of property which was included in the residuum.—*Miller et al. v. Caragher*, 330.
17. By testator's will the executors were directed, after the death of the widow, to sell his real estate, divide the proceeds and give certain shares thereof to certain religious associations which were then to testator's knowledge not incorporated, but which were duly incorporated before the widow's death. *Held*, That the bequests did not vest till the widow's death and the legatees named having been duly incorporated at that time were capable of taking, and that it was sufficient that they were so described that they could be ascertained and known when the right to receive the legacies existed.—*Shipman v. Rollins et al.*, 344.
18. The will directed a certain sum to be invested and portions of the income paid to E. and L., the balance to a charitable institution unless testator's sister should become a widow and then to her. On the death of either her share of the income to be paid to said institution and also the principal on the death of E. L. and said sister. *Held*, That the bequest of the principal was void.—*Id.*
19. When by the will of a testator he devises and bequeaths all his property, real and personal, as provided by the laws of the state of New York in cases of intestacy, whatever rights or interests his next of kin are entitled to in his estate are derived from the will and not from the provisions of the statute, and the effect of the reference made to the laws of the state in cases of intestacy is merely to determine who the persons are who should take under the direction contained in the will and the extent of the interests so to be taken.—*DeCaumont et al. v. Bogert et al.*, 369.
20. The provisions of the statute in regard to advancements do not apply to such a case, and transfers of personal property made by the testator to certain of his next of kin previous to the execution of his will are not advancements to them, and are not intended to be such by him when it appears that he did not contemplate an equal division of his estate.—*Id.*
21. Testator left a widow and four children, two of whom were minors. By his will he left his estate to his executors in trust to invest and pay the income to his wife and children until all or the youngest survivor should come of age and then to divide the estate, two-thirds to be divided among the children, the shares of the two daughters to be held in trust for them respectively and the income paid to them during their lives, with power of sale to carry out the trust, etc. One of the daughters was a minor. *Held*, That the suspension of alienation for two minorities would be equivalent to one for two lives; that the trust for the minor daughter was lawful, but that for the other daughter was void, it being for three lives.—*Benedict et al. v. Webb*, 382.
22. The will of testatrix devised her estate in trust to her executors to divide the same into six equal parts; to convey two of such parts to two of her sons; to divide the income of the remaining four equal parts among her three remaining sons and her daughter in equal shares equally during their several and respective lives; upon their several and respective deaths to convey the shares of the principal producing the income of the one so dying to his or her child or children upon their arriving at the age of twenty-one years, and to the issue of any such children who might be deceased at the death of his par-

- ent, but if any such children should die before the age of twenty-one, and without leaving issue, then the share of the one so dying should become part of the residuary estate for the benefit of all the testatrix' children, in the same share and under the same trusts and limitations before provided for. *Held*, That the trust was valid of one-fourth for each terminable as to each at his or her death; that the children referred to in the direction as to contingent remainders are the children of the beneficiaries.—*Tiers v. Tiers et al.*, 887.
23. It also provided that in the event of either of the testatrix' children dying without issue, but leaving a wife or husband surviving, then the income of the share of the one so dying should be paid to the surviving wife or husband during life, and, after the death or marriage of such surviving wife or husband should be divided according to the terms of the will. *Held*, void.—*Id.*
24. Testator's will directed the executors to divide the residuary estate equally among certain children named, each to have the use and benefit of one share for life, with reversion of the principal to his or her issue, if any. *Held*, That the children were entitled to the use of their shares and that no trust was interposed between them and the actual enjoyment of the shares.—*Williams et al. v. Freeman et al.*, 409.
25. The will also gave the executors a power of sale and directed that the proceeds and other moneys not needed for immediate use be deposited or invested as directed until a final settlement. No direction was given as to the income and no specific words creating a trust. *Held*, That no trust was created by this provision.—*Id.*
26. Testator by his will gave all his property, real and personal, to his wife "to have and hold the same, and to receive and enjoy as her own property, the rents, issues and profits therefrom," for life in lieu of dower. He left two farms and on them agricultural implements, live stock and farm produce, which the executor did not include in his account. *Held*, That testator intended that the widow should enjoy and use the property as he had done and in the same form in which he left it, and not that the executor should sell the personal property and pay her only the income on the proceeds.—*In re accounting of Yates*, 428.
27. Testator by his will bequeathed to his wife "The sum of five hundred dollars, payable yearly and every year out of the income of my estate," and to his daughter he bequeathed a bond and mortgage for \$3,000 against D. It appeared that the income of the estate, exclusive of the bond and mortgage, was not sufficient to pay the legacy to his wife. *Held*, That the provision for the widow is the dominant one and that it was the duty of the executors to hold the mortgage during the widow's life and use the interest towards making up the annuity, and upon her death to transfer the mortgage or its proceeds to the daughter.—*Stimson et al. v. Vroman et al.*, 431.
28. The will of testator provided that on the death of his widow his estate should be divided into five equal parts, one of which he gave to his executors in trust for his son; it then provided as to three of his children, "the other equal one fifth-part thereof to" the son or daughter respectively, "and if she (or he) leaves no child or children surviving then to pay the same to my other children herein named or their heirs or representatives;" as to the other daughter there was a similar provision, omitting the word "no." *Held*, That the ownership and power of disposition over their shares by all of the children except the first named was not absolute, but conditional; that it was the intention of testator that the possession and control of said shares should be given to the children named personally to be held to await the event on which absolute ownership depended; that his children were all to be equally provided for, and that the word "no" should be inserted in the last provision.—*In re accounting of exrs. of Nanny*, 532.

See CONTRACT, 8, 13; EXECUTORS, 2.

Ex. J. A. A.

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